

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
Petitioner,
v.

JOSEPH E. O'NEILL, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

JOINT APPENDIX

JOHN P. FRANK
Counsel of Record
MARTU HARPER
ALLEN R. CLARKE
JANET NAPOLITANO
LEWIS AND ROCA
40 North Central Avenue
Phoenix, Arizona 85004
(602) 262-5311
Counsel for Respondents
Joseph E. O'Neill, et al.

HAROLD G. LEVISON
Counsel of Record
JED S. RAKOFF
MICHAEL C. HARWOOD
MUDGE ROSE GUTHRIE
ALEXANDER & FERDON
180 Maiden Lane
New York, NY 10038
(202) 510-7000
— GARY GREEN
1625 Massachusetts Ave., N.W.
Washington, D.C. 20036
JOHN A. IRVINE
921 Main Street
Houston, TX 77012
DAVID SILBERMAN
LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner
Air Line Pilots Association

PETITION FOR CERTIORARI FILED MARCH 23, 1990
CERTIORARI GRANTED OCTOBER 1, 1990

TABLE OF CONTENTS

	Page
Docket Entries	1
United States Bankruptcy Court, Southern District of Texas, Houston Division, Order Relative to Claims....	7
First Amended Complaint	42
Answer	60
United States District Court for the Southern District of Texas, Houston Division, Court's Ruling	72
United States Court of Appeals, Fifth Circuit, Decision and Order	78
United States Court of Appeals, Fifth Circuit, Order on Petition for Rehearing and Suggestion for Re- hearing <i>En Banc</i>	99

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Docket No. H-86-1718

JOSEPH E. O'NEILL, *et al.*,
v. *Plaintiffs*

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, *et al.*,
Defendants

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
4-25-86	1	COMPLAINT FOR VIOLATION OF RAILWAY LABOR ACT, LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT AND STATE COMMON LAW BREACH OF CONTRACT, filed. sv/vgb
5-16-86	14	First AMENDED COMPLAINT and Jury Demand, filed. jl Dkt'd 5-19-86
7-31-86	19	Defts' ANSWER, filed, sas Dkt'd 8-4-86
2-6-87	77	(LNH) MEMORANDUM ON ATTORNEY-CLIENT PRIVILEGE. filed. fs The claim of privilege against the pltfs will be overruled with a limitation on disclosure to Continental management. The claim of work product privilege will be limited to this suit and will not apply to work product in former litigation. dkt'd 2-6-87
2-6-87	78	(LNH) ORDER CERTIFYING INTERLOCUTORY APPEAL AND PARTIAL STAY OF DISCOVERY, filed. jlp Parties ntfd.

DATE	NR.	PROCEEDINGS
		<ol style="list-style-type: none"> 1. Order of this court of Feb. 6, 1987, on the pltfs' motion to compel production may be appealed to the U.S. Court of Appeals for the 5th Circuit 2. Court's order on attny client privilege only (but not work product for concluded litigation) shall be stayed pending determination of that appeal, but all discovery not directly covered by the assertion of attny-client privilege by the union shall proceed. dkt'd 2-9-87
2-6-87	79	DEFTS' MOTION FOR CERTIFICATION OF APPEAL AND FOR STAY OF DISCOVERY PENDING APPEAL PURSUANT TO 28 U.S.C. SECTION 1292(b), filed. jlp dkt'd 2-9-87 M/D Mar 2, 1987 by clerk
2-9-87	80	Pltf's MOTION FOR RECONSIDERATION of Certification of Appeal and stay pending appeal and RESPONSE to Motion for Certification and stay, filed. db dkt'd 2-10-87 M/D Mar 2, 1987 by clerk
2-26-87	83	(LNH) ORDER, filed. Parties ntfd. jlp <ol style="list-style-type: none"> 1. Pltfs' motion for reconsideration is denied. dkt'd 2-27-87
2-26-87	84	(LNH) ORDER, filed. Parties ntfd. jlp <ol style="list-style-type: none"> 1. Motion to certify this case as a class action will be considered after June 1, 1987. By that date, the pltfs must inform the court of the number of potential pltfs, and they must move for certification. The defts have until June 20, 1987 to respond to the motion if it is filed. dkt'd 2-27-87

DATE	NR.	PROCEEDINGS
8-3-87	131	Defts NOTICE OF MOTION FOR SUMMARY JUDGMENT, w/Supporting Affidavits and Exhibits. and proposed Order attached. filed. fs dkt'd 8-4-87
8-3-87	132	MEMORANDUM OF LAW IN SUPPORT OF Defts' Motion for Summary Judgment and Judgment on the Pleadings. filed. fs dkt'd 8-4-87
8-4-87 SEALED		Rec'd Depositions Submitted in support of Defts' Motion for Summary Judgment and Judgment on the Pleadings. (loose in expandable folder) fs 8-5-87
8-4-87 SEALED		Rec'd Strike Strategy Information submitted in Support of Defts' Motion for Summary Judgment and Judgment on the Pleadings. (loose in expandable folder). fs. 8-5-87
8-12-87	136	Defts' MEMORANDUM OF LAW IN OPPOSITION to Class Certification and in Response to Pltfs' Status Conference Memorandum. filed. fs dkt'd 8-12-87
8-14-87	138	(LNH) MINUTES OF MOTION HEARING. filed. fs Rptr: G Dye Appearances: Griffin, Levinson, Irvine & Abney f/defts. Wood, Kundre, Clarke-Harper, Schaden f/pltfs and interested parties. Pltf application to certify class—GRANTED. dkt'd 8-19-87
8-14-87	139	(LNH) CONFERENCE MEMORANDUM, filed. parties ntfd. fs Pltfs to provide solicitation letters and transcript to ALPA by 8/20/87. Class is certified. L & R to provide M,R 1st draft of 23(b)(3) notice asap. Discovery re: solicitation allowed. Pltfs to answer the 3 interrogatories by noon (C.D.T.) 8/18/87. No irrelevancy objections will be countenanced. Capt

DATE	NR.	PROCEEDINGS
		Duffy's redacted material to be produced to Harper or designee; material to be used in <i>this</i> case only. Any of Capt Duff's previously redacted materials that M.R. considers to be extraordinarily sensitive (or any portion of these docs) are to be sent to Court; M.R. to supply redacted and unredacted version. M.R. has 20 days to reconstruct, as best as possible, the last five. Pltfs have until 9/18/87 to oppose to s.j.; opposition can include statement that discovery on this issue is incomplete. Response due by 10/2/87. dkt'd 8-19-87
9/18/87	147	PLTFS' RESPONSE TO DEFT ALPHA'S MOTION FOR SUMMARY JUDGMENT, filed. jlp dkt'd 9-18-87
9-25-87	149	PLTFS' MEMORANDUM OF LAW IN RESPONSE TO DEFTS' MOTION FOR SUMMARY JUDGMENT, VOL 1-5, filed. (UNDER SEAL) jlp dkt'd 9-28-87
10-9-87	153	REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFTS' MOTION FOR SUMMARY judgment and judgment on the pleadings, w/exhibits, filed. jlp dkt'd 10-13-87
11-30-87	158	(LNH) CONF MEMORANDUM (HEARING IN COURT), filed. Parties ntfd. (Rptr: F. Warner) Appearances: Wood, Hulsman, Harper, Clarke f/pltf; Irvine, Levine, Griffin f/deft Pltf & deft stipulate that Henry Duffy, D. Higgins, D. Schnell, R. Lappin and D. Henderson are improper deft under Count 1. Pltf and deft stipulate that ALFA and CAL MEC are improper defts under count 3. An order will be entered granting deft's motion for summary judgment. jlp dkt'd 12-3-87

DATE	NR.	PROCEEDINGS
12-2-87	159	TRANSCRIPT OF COURT RULING OF NOV 30, 1987, filed. jlp dkt'd 12-3-87
12-9-87	161	(LNH) FINAL JUDGMENT, filed, Parties ntfd. mcs Pltf take nothing from defts. Costs taxed against pltfs. Dkt'd 12-14-87
10-11-87	162	TRANSCRIPT OF MOTION FOR SUMMARY JUDGMENT BEFORE JUDGE HUGHES Nov. 30, 1987, filed jlp dkt'd 12-16-87
12-23-87	163	O'NEILL GROUP MOTION FOR RECONSIDERATION OF THE COURT'S DEC 9, 1987 ORDER GRANTING DEFTS' MOTION FOR SUMMARY JUDGMENT w/ attachments (3 volumes), filed. jlp dkt'd 12-24-87 (UNDER SEAL)
1-15-88	165	DEFTS' MEMORANDUM IN OPPOSITION TO PLTFS' MOTION FOR RECONSIDERATION OF THE COURT'S DEC. 9, 1987 ORDER GRANTING DEFTS' MOTION FOR SUMMARY JUDGMENT, w/exhibits. filed. jlp dkt'd 1-19-88
1-29-88	168	O'Neill Group REPLY IN SUPPORT of its Motion for Reconsideration. filed. fs dkt'd 2-3-88
3-21-88	172	SUPPLEMENTAL REPLY IN SUPPORT OF O'NEILL GROUP MOTION FOR RECONSIDERATION, w/exhibits, filed. jlp dkt'd 3-22-88
3/23-88	173	DEFTS' OPPOSITION TO PLTFS' SUPPLEMENTAL REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION, filed. jlp dkt'd 3-24-88
8-8-88	174	(LNH) ORDER DENYING RECONSIDERATION, filed. bj parties ntfd The pltfs' motion to reconsider the summary judgment of Dec. 14, 1987, is denied. dkt'd 8-10-88

DATE	NR.	PROCEEDINGS
9-1-88	175	Pltfs' NOTICE OF APPEAL from Order entered on Aug 8, 1988, filed. bw dkt'd 9-7-88
1-30-89	182	Certified Copy of ORDER by Court of Appeals REMANDING to District Court to enable the parties to file a motion seeking correction of the judgment, IT IS FURTHER ORDERED that the proceedings in this Court are STAYED pending the district court's ruling on such motion, filed. bw dkt'd 2-17-89
-1-89	187	(LNH) AMENDED FINAL JUDGMENT, ENTERED. Parties ntfd. All Pltfs, including the class take nothing from Defts. Costs are taxed against the Pltfs.
-1-89	188	(LNH) OPINION ON AMENDED FINAL JUDGMENT, ENTERED. Parties ntfd. mac Some pltfs were omitted from the judgment of Dec 9, 1987, it is amended to include all pltfs who are a party to this suit and is a final and appealable order.
-6-89	189	Pltf's NOTICE OF APPEAL to Final Judgment entered Mar 1, 1989, filed. Dkt'd 3-7-89
-25-90	190	Certified copy of the JUDGMENT by the CCA on 10-31-89 issued as MANDATE 1-19-20 VACATING the judgment of the District Court and REMANDING to the District Court for further proceedings and it is further ORDERED that debt-appellees pay to pltf-appellants the costs on appeal, filed. eod 3-9-90 km
-25-90	191	Certified copy of the OPINION by the CCA, filed. eod 3-9-90 km

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: CONTINENTAL AIRLINES CORPORATION,
Case No. 83-04019-H2-5

CONTINENTAL AIR LINES, INC.,
Case No. 83-04020-H1-5

TEXAS INTERNATIONAL AIRLINES, INC.,
Case No. 83-04021-H3-5

TXIA HOLDINGS CORPORATION,
Case No. 83-04022-H3-5
DEBTORS

Consolidated Under
Case No. 83-04019-H2-5

ORDER RELATIVE TO CLAIMS,
CONTROVERSIES AND RELATED LITIGATION

This matter has come on before the Court upon the joint motion and request of the above-named Debtors (hereinafter "Continental") and the Air Line Pilots Association, International (hereinafter "ALPA"), for the entry of an Order resolving their pending claims, controversies and related litigation.

Pursuant to orders of this Court dated July 2, 1985, Continental and ALPA have been engaged in lengthy and complex negotiations to settle and compromise their disputes, to end the ongoing ALPA strike against Continental, to resolve all other pending claims and litigation

and to assure a fair and equitable treatment of all pilot employees of Continental—those now at work and those on strike. Settlement discussions between Continental and ALPA have continued non-stop since October 18, 1985. Continental and ALPA have consented to have this Court resolve all outstanding issues submitted this Court.

After considering all matters and issues before the Court as between Continental and ALPA, this Court, in the exercise of its equitable powers pursuant to Section 105 of the Bankruptcy Code, and as an interest arbitrator pursuant to the agreement and consent of ALPA and Continental, hereby makes the following findings and orders:

1. Continental and ALPA have consented in open Court on October 30 and 31, 1985 to the entry of an Order by this Court, both in its Judicial capacity and as a Interest Arbitrator (the latter designation having been specifically requested, agreed and consented to by Continental and ALPA in open Court on this date) to render a final, binding, non-appealable decision on all outstanding issues as between Continental and ALPA; and

2. Continental and ALPA have further agreed in open Court, both by and through statement of counsel and by authorized representatives on October 30, 1985 to waive any right to appeal, modify or otherwise challenge the decision and award of this Court with respect to all issues as between Continental and ALPA.

Based on the foregoing, it is accordingly ORDERED, ADJUDGED and DECREED:

1. The determination and resolution of claims and controversies is set out in Exhibit "1"; and

2. Continental and ALPA are ordered and directed to take such steps as are necessary to implement in Exhibit "1" to this Order; and

3. Continental and ALPA are ordered and directed to file such pleadings as are necessary to dismiss all litigation pending between them in the Bankruptcy Court, any United States District Court, any United States Courts of Appeals, or otherwise, as such litigation is more specifically set out in attachment "B" to Exhibit "1" hereto.

It is so ORDERED, ADJUDGED AND DECREED this 31st day of October, 1985.

/s/ _____
T. GLOVER ROBERTS
United States Bankruptcy Judge

ORDER AND AWARD

I. *Termination of Strike and Back To Work Issues*A. *General*

1. *Termination of Strike.* Effective with the entry of this Order and Award, ALPA shall terminate its strike against Continental Airlines and all picketing, job actions, boycotts, disparagement and public statements by ALPA, (or any ALPA spokesman, representative, officer or agent) critical of the pilots or operations of Continental Airlines and all other strike-related activities directed against Continental, or any affiliate of Continental shall cease.

2. *No Recrimination or Retaliation.* No pilot shall be subject to discrimination, fines or harassment, either by ALPA or by the Company, due to legally protected strike activities, work during the strike or service as a replacement pilot during the strike period. These assurances against recriminations or retaliation expressly apply to employment or reemployment at Continental or at another employer. This will not affect ALPA's right to determine who will be continued as a member or readmitted to membership.

3. *Terminated Pilots.* All striking pilots terminated for cause between September 24, 1983 and the date of this Order and Award, except those convicted of a felony offense, shall have the right to submit their case to arbitration, as provided in Section V below; such pilots shall not be eligible to elect to return to work unless and until reinstated as a result of such arbitration.

B. *Reinstatement Rights and Procedures*

1. *Right to Reinstatement* All pilots on the July 31, 1983 seniority list who are not currently active or on authorized leave and who have not resigned, retired, or been terminated for cause (subject to reinstatement by

arbitration pursuant to section I.A.3.) shall be eligible to elect recall and reinstatement in accord with the procedures set forth herein. All such pilots who elect recall and resolution of their claims against Continental, its employees and affiliates, as provided in Section III.B.1., infra, shall be placed on a new preferential recall list in seniority order, and shall be treated for purposes of this Order and Award as having made an offer to return to work as of September 15, 1985. Such a pilot who elects recall but does not wish to resolve his/her claims in said manner shall be placed on the recall list and recalled subsequent to the recall of waiving pilots in the order in which his/her unconditional offer to return to work was received by Continental.

2. *Filling of Vacancies.*

(a) *New Vacancies.* All future vacancies will be made available to eligible working pilots and returning strikers in accord with the provisions of this paragraph 2. "Vacancy" as used herein means any unstaffed pilot position which results from systemwide expansion or attrition; a redistribution of aircraft or flight time which does not result in a net increase in the total number of system Captains or the total number of system First Officers does not create a "vacancy". No working pilot (including training, supervisory and management pilots) shall be displaced in status from his/her awarded bid position as a result of the return to work of a striking pilot. Except as provided in sub-paragraphs (b) and (c) below, striking pilots who are reinstated will thereafter bid with working pilots and pilots on approved leaves of absence for all new vacancies. A pilot who has elected the Recall Option must thereafter accept a vacancy offered to him/her; a pilot who declines to accept such a vacancy shall be removed from the seniority list and shall have no further rights under this Order and Award. A pilot has an obligation to keep Continental current on his/her address for contact.

(b) *Initial Assignments.* The status of a returning striker (Captain, First Officer, Second Officer) shall be determined on the basis of seniority among available vacancies in accord with the provisions of subparagraph (c), *infra*, provided that (1) any pilot who was not holding a Captain position as of September 24, 1983 and who has been out of Continental service for a period in excess of 24 months prior to his/her return to service shall be required to fly six (6) months in a First Officer position before being eligible for assignment to a Captain position; and (2) any pilot who held a Captain position as of September 24, 1983 and who has been out of Continental service for a period in excess of twenty-four (24) months prior to his/her return to service, shall be required to fly four (4) months in a First Officer position before being eligible for assignment to a Captain position. The initial base and equipment of a returning striker shall be assigned by the Company; the base and equipment of a returned striker in his/her initial post-strike service as a Captain may also be assigned by the Company. Thereafter base and equipment will be determined in accord with the Pilot Employment Policy.

(c) *Allocation of Vacancies: Transitional Provisions.* In light [of] the unique circumstances of this Order and Award, current and future vacancies shall be allocated in accord with the following provisions of this subparagraph (c).

(i) All pilots awarded positions on Vacancy Bid 1985-5 shall receive the position awarded, subject only to delay to a date necessary to accommodate the return of striking pilots in accord with the provisions of this paragraph (c). The Company may reallocate the awarded vacancies on that bid to different equipment within status where necessary to accommodate changes in the projected fleet, provided that the total number of awarded vacancies by status shall not be increased by such an adjustment.

(ii) Currently working pilots shall assume the first 100 Captain positions awarded in Vacancy Bid 1985-5. Subject to the provisions of subparagraph (b), the next 70 Captain positions shall be awarded in seniority order to returning strikers who have resolved their claims against Continental, its employees and affiliates, as provided in Section III.B.1., *infra*. Thereafter returning strikers shall assume Captain positions on a 1:1 ratio with working pilots (i.e. every other Captain position to a returning striker); said ratio shall remain effective unless and until changed as provided in subparagraph (c) (v) below. The award of 70 Captain positions to such returning strikers shall commence no later than May 1, 1986 and be accomplished no later than August 1, 1986. In the event any of these positions is not available by August 1, 1986, the Company will pay protect each adversely affected First Officer at Captain rates of pay until that First Officer Achieves a Captain position.

(iii) The Company will make available to returning strikers who have resolved their claims against Continental, its employees and affiliates, as provided in Section III.B.1.-2., *infra*, 70 First Officer vacancies, commencing as of January 1, 1986, on a schedule sufficient to allow returning strikers to assume the 70 Captain positions made available by subparagraph (c) (ii), *supra*. Thereafter, the Company will award sufficient First Officer positions to returning strikers to provide for advancement to Captain in accordance with the schedule and ratio set forth above.

(iv) Following the award of 70 Captain positions to returning strikers, additional captain positions are projected to become available according to the following schedule, to be filled by working pilots and returning strikers on a 1:1 basis:

(a) 46 additional Captain positions by 10/1/86;

(b) 46 additional Captain positions by 1/1/87;

- (c) 46 additional Captain positions by 7/1/87;
- (d) 46 additional Captain positions by 1/1/88;
- (e) 46 additional Captain positions by 7/1/88.

In the event any of the foregoing Captain positions is not available by the projected date, the Company will pay protect each adversely affected First Officer at Captain rates of pay until that First Officer achieves a Captain position. In the event of increases to staffing requirements, the projected Captain vacancy schedule will be accelerated accordingly and will continue to be allocated on a 1:1 basis between working pilots and striking pilots.

(v) The 1:1 ratio for filling Captain vacancies shall remain in effect until October 1, 1988. The question of what ratio for Captain vacancies should remain in effect beyond that time shall be submitted to final and binding arbitration in accord with the following provisions. The arbitrator or the method for selection of the arbitrator shall be designated by the parties in a side agreement. Either the Company or any affected pilot may request the commencement of an arbitration proceeding on or about April 1, 1988. The Company or the affected pilot shall thereupon notify the arbitrator and the parties shall jointly schedule an arbitration, which must be commenced within sixty (60) days of the initial request. The arbitration shall be conducted in accord with the rules and procedures of the American Arbitration Association and any resulting Award shall be subject to review and/or enforcement under the U.S. Arbitration Act. The affected pilot(s) may designate any personal representative to appear in his (their) behalf. The arbitrator shall take into account all relevant facts and circumstances in reaching his decision; in no event shall the final ratio be zero for either the working pilots or the striking pilots.

(vi) Striking pilots awarded the first 70 First Officer positions which become available to returning strikers

shall not be assigned a Second Officer vacancy in the interim; all other returning strikers must accept assignment to available vacancies in seniority order subject to the provisions of this paragraph 2.

(vii) For purposes of this Order and Award, "returning striker" means a pilot on strike as of September 15, 1985 (including those then on the preferential recall list) who elects recall pursuant to the terms of this Order and Award; "working pilot" means a pilot in active service (including flight instructors, supervisory and management pilots), in training, or on authorized leave as of September 15, 1985. New hire pilots who received employment commitments prior to September 15, 1985, but entered training thereafter shall be entitled to hold Second Officer positions until entitled to advance to other positions in accord with the Pilot Employment Policy. It is understood that the Company may advance the dates of assignment as Captains (subject to the provisions of subparagraph b).

(d) *Reductions In Force.* In the event of a future reduction-in-force, pilots will be displaced in status and/or furloughed on the basis of seniority; in any subsequent recall, pilots displaced or furloughed as a result of the reduction in force shall be reinstated in their former positions prior to (1) the advancement in status of any other pilot to such positions and (2) the recall of any pilot then on the preferential recall list.

3. Seniority List.

(a) The CAL/TXI integrated pilot seniority list effective July 31, 1983, will be revised by deleting all pilots who have resigned, retired, elected severance, not responded to the Notice in paragraph 5(a) below, or been terminated for cause (subject to reinstatement by arbitration pursuant to paragraph I.A.3.). Pilots presently classified as permanently disabled will be treated in accord with subparagraph (b), below. Pilots on furlough

status as of September 24, 1983 who are not currently active or on authorized leave may have their seniority adjusted to reflect credit only for periods of active service in accord with subparagraph (c) below. All pilots hired since October 1, 1983 will be placed on the revised list in order of date of hire and date of birth within training class. The new list will be published forthwith.

(b) Pilots on permanent disability status as of the date of this Order and Award will be given the option to elect a return to active service, or alternatively, to be removed from the Seniority List, in accord with the following procedures. Each such pilot will be notified of his options in accord with Section I.B.5. of this Order and Award; a pilot who elects to pursue recall will be given a medical and/or psychiatric examination (as appropriate, based on the nature of disability) by a Company-selected medical examiner on or before January 15, 1986 to determine eligibility for recall. If the pilot is deemed by the medical examiner to be medically certifiable for active flight duty on or before December 31, 1988, such pilot will be retained on the seniority list and will be activated as soon as medically qualified; such pilot will remain on permanent disability status until activated. If a pilot should fail to so qualify for active flight duty on or before December 31, 1988, or voluntarily elects not to seek recall, his name shall be permanently removed from the seniority list and he shall have no further rights of recall or reinstatement; the disability benefits of such a pilot shall continue without interruption.

(c) Pilots on the integrated pilot seniority list effective July 31, 1983 who were on furlough status as of September 24, 1983 and who are not currently active or on authorized leave shall remain on the seniority list in accord with the provisions of this paragraph. The seniority and seniority number of such striking pilots holding seniority numbers up to and including No. 1897 shall

remain intact and unaffected. The seniority and seniority number of such striking pilots holding numbers 1898 through 2025 will be subject to a seniority integration process with pilots hired since September 24, 1983 whereby each such returning furloughed pilot will be assigned a revised seniority number upon the earlier of (1) his return to pay status or (2) January 1, 1987; the revised seniority number will be based on that pilot's length of active service as of the date of such assignment in relationship to the length of active service of pilots hired since September 24, 1983, i.e. the returning furloughed pilot's new seniority number will be in rank order behind a pilot with more time in active service and ahead of a pilot with less time in active service. Time on leave, on furlough, on strike or awaiting recall does not constitute active service for purposes of this Section. This Order and Award modifies the Seniority Integration and Fence Agreement executed August 18, 1982 and the integrated seniority list issued pursuant thereto.

4. *Retention of Recall Rights.* All pilots electing the option of returning to work will retain their right to reinstatement until December 31, 1988; if such a pilot has not been reinstated by that date, his/her name shall be removed from the seniority list and s/he shall have no further right to recall or other rights under this Order and Award; provided, however, that in the event of a reduction in force commencing between the date of this Order and Award and December 31, 1988, the period of time during which recall rights remain in effect shall be extended beyond December 31, 1988 for a length of time equal to the length of time such a reduction in force remained in effect.

5. *Notification and Recall Procedures.*

(a) Within ten days of the date of this Order and Award, the Company shall mail the attached Notice of Options to all striking pilots to advise them of their

options under this Order and Award. (Notice to be drafted as Attachment A).

(b) All pilots so notified in writing will have twenty-one (21) days from their receipt of said Notice to advise the Company in writing of their intent to return to work or elect any other option(s) made available to them by this Order and Award. A pilot who receives said Notice, or who refuses or avoids said Notice, and fails to respond and elect his options within the time specified shall have his/her name removed from the seniority list and shall have no further rights under this Order and Award.

(c) If the Company is unable to notify a pilot concerning reinstatement and other options made available by this Order and Award, the Company shall temporarily bypass for reinstatement such pilot. The Company and ALPA shall attempt to locate such pilot and deliver said Notice for a period of forty-five (45) days from the date of mailing her/his Notice. If such pilot has not then been located by either party and acknowledged receipt of the Notice of Options his/her name will be removed from the System Seniority List and he/she shall have no further rights under this Order and Award.

(d) For the purposes of this Section, "notified in writing" means attempted delivery to the last known address by the U.S. Postal Service of a letter sent Certified Mail, marked "Deliver to Addressee Only" and return receipt requested.

(e) A pilot electing reinstatement will subsequently receive a separate Recall Notice specifying a scheduled reporting date for training. Upon recall, a pilot will be allowed at least fourteen (14) days, from the date of the recall notice, to report for training. A recalled pilot shall confirm to the Company in writing within five (5) days of receipt of recall notice that he will return to service and report for training as scheduled. A pilot who fails to confirm his intention to return or to actually report

for training within the time frame specified above will be considered out of the service of the Company and his/her name will be removed from the System Seniority List. For the purposes of this paragraph all required written notices between the Company and the pilot means attempted delivery to the last known address by the U.S. Postal Service of a letter sent Certified Mail, marked "Deliver to Addressee Only" and return receipt requested.

6. *Medical Qualification of Returning Pilots.*

(a) Each returning pilot must complete a Company physical and psychological examination. Additionally, each returning pilot must maintain a Class I Federal Aviation Administration Medical Certificate; however, those returning to First and Second Officer positions may utilize the Class I FAA Medical Certificate for a period of twelve (12) months or as consistent with Federal Air Regulations. If a pilot cannot maintain the Class I certificate, s/he will so notify the Company in writing and will thereafter be permitted to bid only for vacancies in a status which his/her medical certificate, seniority and FARs allow him/her to hold.

(b) In the event a pilot fails to pass the Company physical examination, the following procedure will apply except in those cases where disqualifying drugs have been detected in the drug screen test*:

(i) A copy of the findings of the Company medical examiner shall be furnished to the pilot within fifteen (15) days. In the event that the pilot disagrees with such findings, the pilot may, within seven (7) days, employ a qualified medical examiner of his/her own choosing and at his/her own expense for the purpose of conducting a second medical examination.

* A pilot adversely affected as a result of a drug screen test shall have the right to grieve any adverse action in accord with the Pilot Employment Policy.

(ii) In the event that the findings of the medical examiner chosen by the employee disagree with the findings of the medical examiner employed by the Company, the Company will, at the written request of the employee, given within seven (7) days of such disagreement, ask that the two medical examiners agree upon and appoint a third, qualified and disinterested medical examiner, preferably a specialist, for the purpose of making a further medical examination of the employee.

(iii) The said disinterested medical examiner shall then, as soon as practicable, make a further examination of the pilot in question and the case shall be settled on the basis of his/her findings. Copies of such medical examiner's report shall be furnished to the Company and to the pilot as soon as practicable.

(iv) The expense of employing the disinterested medical examiner shall be borne one-half by the pilot and one-half by the Company.

7. *Compensation While in Training.*

A returning pilot in training at a place other than his/her last home base shall be provided lodging, transportation and per diem as specified herein:

(a) Pilots shall be provided suitable single room accommodations and shall be provided, or reimbursed with proper documentation, reasonable transportation to and from the training facility and the airport.

(b) The Company shall teletype an on-line round-trip positive space (PS-5) pass authorization on the on-line city nearest such pilot's location if s/he is not residing in the city where his/her training is to be provided. Such passes shall be available at the ticket counter and valid for use two (2) days prior to the pilot's scheduled report date for training until two (2) days following the day his/her training is completed. If the pilot is unable to travel during these two (2) days due to passenger

loads, his/her pass authorization shall be renewed as needed. A pilot who is unable to travel to training due to passenger loads shall be offered and assigned alternative training sessions and s/he shall not have his/her return to active duty affected due to his/her inability to travel.

(c) The Company shall teletype an on-line positive space (PS-5) pass authorization to the on-line city nearest a pilot's location in order for him/her to report for his/her first day of duty with the Company if s/he does not reside in the city where his/her Home Base Domicile is located. Such pass shall be valid for use two (2) days prior to the date s/he is scheduled to report for duty with the Company.

(d) A pilot, when in training, shall be paid per diem in accord with the Pilot Employment Policy. A pilot will be placed on the payroll after five (5) days in training whether or not s/he has completed training; the pay status will be that of the position the pilot is expected to occupy on his first day of active service as a line pilot.

8. (a) Training will be accomplished in accordance with the Company's FAA Approved Flight Crew Training Manual. In addition to the syllabus of training outlined in the manual, up to two additional simulator periods will be scheduled if necessary to satisfactorily complete the required training periods. Scheduling of training will normally insure changes of instructor. If a pilot fails to qualify, he/she will repeat the syllabus including the two extra simulator periods if required after a maximum fourteen (14) day period free of all duty. The syllabus may be reduced during the second training cycle by the pilot if desired, i.e., ground school, CPTs, etc.

(b) The disposition of a pilot who fails to qualify after the second training cycle will be determined by the Vice President-Flight Operations, subject to the pilot's right to pursue the dispute resolution procedure

in Section V below. Nothing herein shall constitute a requirement that the Company maintain a permanent First or Second Officer position for a pilot who has failed to qualify for a promotion to Captain.

9. Striking pilots who elect recall will accrue seniority for all purposes during period of strike and while awaiting recall; such pilots will not accrue longevity credit for active service for purposes of pay and vacations for such periods. Pilots who were not in continuous active service from October 31, 1983 through December 31, 1983 shall not receive any stock or other rights under the Stock Bonus Plan.

II. *Severance Option And Claims Waiver*

A. *Severance Pay and Claims Waiver*

1. Each active pilot on the CAL/TXI integrated seniority list as of September 24, 1983, as revised by Paragraph I.B.3., including those pilots who have been terminated (subject to reinstatement by arbitration pursuant to Section I.A.3.) who (a) has not died, resigned, retired, or become permanently disabled, and (b) who is currently on strike and (c) who is not employed (on the active payroll) as a pilot by an F.A.R. Part 121 air carrier as of the date of this Order and Award will be given the option of electing Severance Pay, in exchange for (1) waiver of his/her right to recall and (2) waiver of all claims against the Company, its employees and affiliates, as set forth in paragraph II.C. below. A pilot electing this Severance Pay Option shall notify the Company of his election within twenty-one (21) days following his receipt of the Notice provided pursuant to Section I.B.5; such election shall be irrevocable and shall constitute resignation of his/her seniority number and a waiver of all further rights to recall or reinstatement. The Severance Pay Option shall be deemed waived and unavailable to any pilot who does not notify the Company in writing of his election of the Severance Option within

twenty-one (21) days of his receipt of the Notice of Options provided pursuant to Section I.B.5, supra. The parties shall cooperate in identifying those pilots employed at Part 121 air carriers.

2. The amount of Severance Pay for each pilot eligible to elect this option pursuant to paragraph 1 will be calculated by multiplying \$4,000 times the number of years of active service with the Company as of September 24, 1983; provided however, the total dollar amount of severance pay for those pilots electing severance who were not drawing ALPA strike benefits as of September 15, 1985 and were not on furlough status as of September 24, 1983 shall not exceed \$2.6 million. In the event a sufficient number of pilots in this category elect severance pay which causes the dollar amount to exceed \$2.6 million, the \$4,000 multiplier shall be reduced sufficiently so that pilots in this category do not receive a total aggregate severance pay distribution exceeding \$2.6 million. Years of service will be calculated by crediting the pilot with one (1) year of active service for each calendar year of active service as a pilot, with partial years to be pro-rated, during the period beginning with the pilot's date of hire shown on the CAL/TXI integrated seniority list and ending on September 24, 1983.

3. A pilot on furlough status as of September 24, 1983 who is not currently active (including those pilots who have been terminated (subject to reinstatement by arbitration pursuant to Section I.A.3.) and who has not died, resigned, retired, or become permanently disabled and who is not employed (on the active payroll) as a pilot by a Part 121 air carrier as of the date of this Order and Award will be given the option of electing Severance Pay subject to the same waivers and procedures set forth in paragraphs II.A.1-2., supra, provided that the severance rate will be \$2,000 per year of active service as of September 24, 1983. The parties shall cooperate in identifying those pilots employed at Part 121 air carriers.

4. The schedule for payment to those electing this Severance Pay Option will be as follows:

10%—on or before December 15, 1985.

15%—upon confirmation of a reorganization plan, but in no event later than June 30, 1986.

Balance—quarterly payments in accordance with the following schedule commencing September 30, 1986.

- (a) 1 year-5 years active service—4 quarterly payments
- (b) 6 years-10 years active service—8 quarterly payments
- (c) 11 years-15 years active service—12 quarterly payments
- (d) 16 years-20 years active service—16 quarterly payments
- (e) 20 years + active service—20 quarterly payments

The Company may accelerate the timing and/or increase the amount of such payments.

Interest at a rate of 10% shall accrue on amounts which remain due after eight quarters from September 30, 1986. The Company shall not be responsible for withholding FICA or FIT from these payments but will supply each payee with an annual Form 1099 showing the amount paid in each taxable year.

B. *Early Out Pass Privileges and Claims Waiver*

1. Each pilot on the CAL/TXI integrated seniority list who was in furlough status as of September 24, 1983, and who is not currently active and who has not resigned, retired, or been terminated for cause (subject to reinstatement by arbitration pursuant to paragraph I.A.3.) and who is not employed (on the active payroll) as a

pilot by a Part 121 air carrier as of the date of this Order and Award, shall be eligible (in addition to severance pay pursuant to Section I.A.3.) to elect Early Out Pass Privileges as set forth in subparagraph B.2. infra in exchange for (1) waiver of his/her right to recall and (2) waiver of all claims against the Company, its employees and affiliates, as set forth in subparagraph II.C. below. A pilot electing this Early Out option shall notify the Company of his election within twenty-one (21) days following his receipt of the Notice provided pursuant to Section I.B.5.; such election shall be irrevocable and shall constitute resignation of his/her seniority number and a waiver of all further rights to recall or reinstatement. The Early Out Option shall be deemed waived and unavailable to any pilot who does not notify the Company in writing of his election of the Early Out Option within twenty-one (21) days of his receipt of the Notice of Options provided pursuant to Section I.B.5., supra.

2. Pilots electing this Early Out option shall receive pass privileges commencing January 1, 1986, as follows:

Pass Privileges (on-line only)

Hire Date	Annual On-Line Round-Trips	Service Charge
August 1, 1965 or before	20	(Same (As For (Active (Employees
August 2, 1965 through August 1, 1975	8	(Employees
August 2, 1975 through August 1, 1980	6	(
August 2, 1980 through August 1, 1982	4**	(

The number of passes per year is an equal number for the employee and the same number of additional passes

** The pass benefit in this category (3 to 5 years of seniority) expires five years from the date of resignation or upon the death of the employee. The benefit for the other categories is for the lifetime of the employee.

for each eligible immediate family member. All pass privileges are subject to Company rules concerning pass privileges; violation of those rules may result in suspension or termination of pass privileges. Any personal income tax consequences arising from use of passes will be the responsibility of the employee. While there are currently no taxes applicable, we cannot predict what the IRS requirements may be in the future. Service charges apply.

C. *Waiver of Claims.*

As a condition to election of the Severance Pay Option or the Early Out Option, each pilot who desires to pursue either Option shall be required to (a) execute a waiver and release of any and all legal claims of any nature against Continental Airlines, its employees (including officers and directors) and affiliates (including Texas Air Corporation) and their employees (including officers and directors), except bankruptcy claims for 1) unpaid pre-petition wages (including bank time and earned per diem) 2) unpaid pre-petition medical and dental expense claims, 3) accrued but unused vacation and 4) reimbursable pre-petition expenses (including moving expenses) (the "surviving bankruptcy claims"), (b) to commit these surviving bankruptcy claims to a trustee to be named by the Company for voting purposes only, with instructions to vote the claims in support of Continental's proposed Reorganization Plan; and (c) to agree to be subject to all the actual final amount due for the surviving bankruptcy claims shall be determined by informal conference between the Company and the employee; in the event of continued disagreement, the final amount due will be determined pursuant to procedures approved by the Bankruptcy Court. The final amount due will be paid in accord with the terms of the final Reorganization Plan to be approved by the Bankruptcy Court.

III. *Other Claims and Litigation*

A. *ALPA Bankruptcy Claims*

All bankruptcy claims filed by ALPA, and all motions and appeals relating thereto, shall be withdrawn and treated as settled and dismissed with prejudice; this provision shall not apply to (1) issues relating to unpaid pre-petition contributions owed by Continental to the Pilot Pension "B" Plan, which issues shall be subject to resolution outside the scope of this Order and Award; (2) the ALPA claim for prospective medical insurance costs for pilots who were in retired status as of September 24, 1983, which shall be subject to resolution as a Bankruptcy Claim but subject to a maximum cap on total liability of \$500,000.

B. *Individual Claims*

1. *Undisputed Items to Be Paid.* Continental will pay 100% of the bankruptcy claims of all pilots, for 1) unpaid pre-petition wages, (including bank time and earned per diem), 2) unpaid pre-petition medical and dental expense claims, 3) accrued but unused vacation and 4) reimbursable pre-petition expenses (including moving expenses), subject only to final determination of the amount due. The actual amount due for such items shall be determined by informal conference between the Company and the employee; in the event of continued disagreement, the final amount due will be determined pursuant to procedures approved by the Bankruptcy Court. The Company will also pay amounts due pursuant to the resolution of ALPA Grievance 12-83 and any other unpaid Grievance Arbitration Awards for monetary relief entered prior to September 24, 1983. In any event, payment for such claims will be in accord with the terms of the final Reorganization Plan to be approved by the Bankruptcy Court.

2. *Waiver of Disputed Items and Release of All Other Legal Claims.* Continental has disputed liability for all

other items asserted as Bankruptcy Claims by individual employees and for all other legal claims threatened or asserted by individual employees. As a condition to participation in the recall by seniority order pursuant to Section I.B., individual striking pilots will be required (a) to waive and release all such disputed bankruptcy claims and all other legal claims of any nature against Continental, its employees (including officers and directors) and affiliates (including Texas Air Corporation) and their employees (including officers and directors); (b) to commit their remaining undisputed bankruptcy claims to a trustee to be named by the Company for voting purposes only with instructions to vote the claim in support of Continental's proposed Reorganization Plan; and (c) to agree to be subject to all terms and provisions of this Order and Award.

3. *Treatment of Pilots Who Decline Waiver.* A striking pilot who declines to execute the waiver described in paragraph III. B. 2, supra, will retain his right to recall but will be recalled subsequent to the recall of waiving pilots and in the chronological order in which each such non-waiving pilot contact(ed) Continental to tender an unconditional offer to return to work. ALPA shall provide no support or assistance, direct or indirect, to any such non-waiving pilot in further pursuit of his bankruptcy claims, or any other claims against Continental, its employees (including officers and directors) or its affiliates and their employees (including officers and directors).

4. *Minimum Level of Participation.* Continental shall have the right to abrogate this Order and Award in the event that less than 80% of the striking pilots eligible to elect options pursuant to this Order and Award fail to elect either (a) Recall with waiver of disputed claims, or (b) The Severance Pay Option and Claims Waiver, or (c) The Early Out Pass Privileges and Claims Waiver.

5. *Remedies in Event of Future Job Actions.* In the event of any job action, slowdown, sick-out, withdrawal of enthusiasm, inordinate fuel burn, inordinate mechanical write-ups or any other improper concerted action by striking pilots who have returned to work, Continental shall have the right to seek an immediate hearing upon 24-hour notice (or such different notice as the Court may set) before Bankruptcy Court Judge Glover T. Roberts (or, if he is unavailable, before the Bankruptcy Court). The Court shall have jurisdiction to issue immediate injunctive relief and such other forms of relief, including damages, as the Court deems appropriate in the circumstances.

C. *Other Bankruptcy Proceedings.*

Except as otherwise provided herein, ALPA will not further participate in Bankruptcy Court proceedings relating to Continental or its affiliates; provided, however, that ALPA may be selected by an affected pilot to appear as his personal representative where a personal representative is permitted to participate in proceedings pursuant to this Order and Award. ALPA will withdraw from further participation in the activities of the Official Union Labor and Pension Creditors Committee.

D. *Pension Issues.*

All pension issues are to be resolved as provided in Attachment C. All claims arising from the freezing, rejection, or termination of any pilot pension plan shall be treated as settled and dismissed with prejudice.

E. *Other Claims and Litigation.*

All pending litigation cases between ALPA, Continental (and its affiliates and their employees, officers and directors) (the "parties") will be treated as settled and dismissed with prejudice and all claims against such parties shall be waived with respect to the subject matter of the pending litigation being dismissed. Continen-

tal will also dismiss its claims against each individual pilot defendant in such litigation who elects an option under this Order and Award which includes resolution of all of his claims against Continental, its employees and affiliates in accord with Section II.C. or Section II.B.2. Continental shall provide no support or assistance, direct or indirect, to any individuals in further pursuit of the lawsuit entitled *Moore et al. v. ALPA*, Civil Action No. H-85-3608 (S.D. Tex.) (fines), other than payment of attorney fees and costs accrued for work performed to the date of this Order and Award which are approved by the Bankruptcy Court. ALPA will withdraw any and all claims and charges it has filed against Continental, its employees or affiliates with any Federal, State or Local government agency. (See Litigation Attachment #B.)

IV. *Non-Recognition*

This Order and Award shall not constitute express or implied recognition of ALPA by Continental as the prospective collective bargaining representative of Continental pilots, and shall not affect the right of any party to recourse before the National Mediation Board for such action as may be appropriate.

V. *Dispute Resolution Procedure*

Any disputes which may arise concerning the interpretation, or application of the terms of this Order and Award, other than cases which may arise pursuant to paragraph I.A.3. or I.B.8(b) of this Order and Award, may be submitted by the affected pilot in writing to the Company. If the dispute is not satisfactorily resolved within five (5) days, the affected pilot may submit the dispute forthwith to the Bankruptcy Court as an adversary proceeding.

Disputes which arise pursuant to Paragraphs I.A.3. or I.B.8.(b) of this Order and Award may likewise be submitted by the affected pilot in writing to the Company.

If the dispute is not satisfactorily resolved within five (5) days, the affected pilot may submit the dispute forthwith to arbitration for final and binding decision. The case shall be heard and decided by one arbitrator to be selected by the alternate striking method from a panel of five (5) names (each of whom shall be a member of the National Academy of Arbitrators) to be provided by the American Arbitration Association upon request of the affected pilot. A coin toss shall be used to determine which party strikes first. The parties expressly agree to select the arbitrator within three (3) days of receipt of the panel provided by the American Arbitration Association. Said arbitration shall commence within forty-five (45) days of the selection of the arbitrator. Any resulting arbitration award shall be subject to enforcement or review in the Bankruptcy Court.

The affected pilot(s) may appear or participate in the dispute resolution process in the Bankruptcy Court or in arbitration by any personal representative of his choice.

The provisions of this Section do not apply to the interpretation or application of the Pilot Employment Policy, the Pilot Scheduling Manual or Company Policy, all of which remain beyond the jurisdiction of this procedure.

VI. *Continuing Jurisdiction and Expiration Date.*

The Bankruptcy Court shall retain jurisdiction, both pending plan confirmation, and post-confirmation, to enforce the terms of this Order and Award. The provisions of this Order and Award shall expire no later than the date on which the last returning striker assumes a Captain position at Continental Airlines. Entered this 31st day of October, 1985, at Houston, Texas, pursuant to the procedural agreement of the parties on the record.

/s/

T. GLOVER ROBERTS
United States Bankruptcy
Judge

LITIGATION ATTACHMENT

All pending Litigation to be dismissed with prejudice, including, but not limited to:

1. *Continental Airlines Corp., et al. v. Air Line Pilots Association, et al.*, Br. Consolidated Case No. 83-04019-H2-5, Adversary Proceeding No. 83-2386-H3 (Bank. S.D. Tex.).
2. *Air Line Pilots Association v. Continental Air Lines, Inc.*, Civil Action No. H-83-6196 (S.D. Tex.); Adversary Proceeding No. 83-2455-H1.
3. *Continental Airlines Corp., et al. v. Air Line Pilots Association, et al.*, (Br. Consolidated Case 83-04019-H2-5, (Bankr. S.D. Tex.)). ALPA to withdraw any and all motions and appeals, including:
 1. Motion to dismiss
 2. Motion to reject contract
 3. CAL motion to pay pre-petition wages to non-returnees
 4. CAL motion to terminate insurance benefits
 5. CAL motion to implement stock ownership program
 6. CAL motion to pay law firms representing disciplined employees
4. *Air Line Pilots Association v. Texas International Airlines Inc.*, Civil Action No. H-81-2200 (S.D. Tex.); No. 83-2272 (5th Cir.). Vacate the District Court's judgment. ALPA to withdraw its grievance in the underlying controversy.
5. *Texas Air Corp. v. Air Line Pilots Association*, Civil Action No. H-84-530 (S.D. Tex.), Adversary Proceeding No. 84-0228H1. ALPA to withdraw with prejudice its

request for arbitration and waive all claims arising under the TAC-ALPA Side Letter.

6. *Continental Air Lines Corp. v. Air Line Pilots Association*, Adversary Proceeding No. 84-0617-H3, Bankr. S.D. Texas. (suit to enjoin TAC arbitration)
7. *Continental Airlines, Inc. v. Air Line Pilots Association, International*, California Superior Court, Los Angeles County No. C-470501.
8. In re New York Air, National Mediation Board File No. CR-5177.
9. *Air Line Pilots Association, International v. Continental Airlines, et al.* Case No. 85-5203 (S.D. Tex.) All claims and counterclaims dismissed.
10. In re Air Line Pilots Association, No. 85-2650 (5th Cir.) (ALPA petition for mandamus).
11. *Air Line Pilots Association, International v. Continental Airlines Corporation et al.*, U.S.D.C. (S.D. Tex.) Civil Action H-85-5675.
12. *Continental Air Lines, Inc. v. ALPA*, Civil Action No. H-84-3069 (S.D. Tex.) (ALPA appeals from Order re mass disciplinary hearings).
13. *Continental Air Lines, Inc. v. ALPA*, Civil Action No. H-83-5979 (S.D. Tex.) (TRO and attorneys fees).
14. *Air Line Pilots Association v. Continental Air Lines, Inc., et al.*, Civil Action No. H-84-1555 (S.D. Tex.) (pension plans).
15. In re *Continental Airlines Corp., et al.*, MBH 85-360 (S.D. Tex.) (Motion for Stay).
16. Grievances. All pending grievances and/or arbitrations shall be treated as settled and dismissed with prejudice except for those grievances relating to terminations for cause which are subject to arbitration pursuant to Section I.A.3.

17. Pending litigation between ALPA and Continental in Great Britain shall be treated as settled and dismissed with prejudice provided that a mechanism for the enforceability of this Order is available.

18. Pending litigation in Australia shall be treated as settled and dismissed with prejudice provided adequate retractions are provided.

Attachment C
October 31, 1985

Terms For An Order On
Consent With Respect To
The Pilots' Pension Plans

A Plan

1. The Continental Air Lines, Inc. ("CAL") Fixed Pension Plan For Pilots (the "A Plan") be, and it hereby is, rejected and terminated effective immediately prior to the commencement of the Chapter 11 case on September 24, 1983, in accordance with the amendment to the CAL Plan dated March 9, 1984, to the extent not inconsistent with this Order.

2. *Open Issue* In order to effectuate the orderly winding up of the A Plan including an orderly distribution of the A Plan's assets as soon as possible, CAL shall continue to administer the A Plan and its assets for the purposes thereafter set forth and shall take the actions hereinafter provided to be taken, provided that CAL shall notice pilot participants and involve the Benefits Board in making decisions relating to the Plan.

3. CAL shall take all steps necessary to obtain from the Internal Revenue Service ("IRS") a determination that the termination of the A Plan does not adversely affect the qualification of the Plan, the application for which has been submitted to the IRS by CAL.

4. The A Plan shall be deemed technically amended in a manner satisfactory to CAL and ALPA, to the extent not previously amended, providing for, among other things:

(a) Full vesting for each participant who did not have a severance of employment prior to September 24, 1983.

(b) In the event of the death of a participant prior to March 9, 1984, payment of the same death benefit as would have been payable under the A Plan prior to its amendment on March 9, 1984.

(c) Continuation of the A Plan's provisions concerning distributions on termination of employment, so that any participant who terminates before the date an annuity is purchased pursuant to paragraph "6" of this Order will receive his distribution (as vested under this Order) under such provisions, subject to any elections he may make pursuant to clause (d), below.

(d) An option for participants who have terminated employment to defer receipt of the distribution of the certificates under the annuity contract to be purchased pursuant to paragraph 6 and of benefits payable under the A Plan until the distribution of benefits under the Continental Air Lines, Inc. Variable Pension Plan for Pilots (the "B Plan").

(e) Automatic consent of CAL to early retirement for all participants upon reaching age 45, provided they have terminated employment.

(f) Technical compliance with the provisions for qualified plans under Section 401 of the Internal Revenue Code.

5. CAL shall provide the proper option forms to the Plan participants within 30 days of the date of the entry of this Order.

6. *Open Issue* Full distribution to Plan participants as a result of the termination of the A Plan shall be made by the purchase of an annuity contract, and distribution of individual certificates under the contract, pursuant to the September 11, 1985 proposal from Prudential Insurance Company of America or any similar proposal by an insurance company acceptable to CAL and the Benefits Board except that lump sum payments will be made for benefits with a present value of less than \$3,500 based on the 1984 Unisex Pension mortality table and PBGC interest rates used for valuing annuities under terminating plans as of the first day of the calen-

dar quarter preceding the date of distribution of the lump sums, except as otherwise may be required by the PBGC. The benefit payment options under the A Plan will be preserved under current terms and will be calculated using an 8% interest rate and the 1984 Unisex Pension mortality table. In addition, in the event of the death of a participant prior to the commencement of the payment of a retirement benefit under the annuity, the only death benefit payable (which shall be payable at no cost to the participant) shall be 50% survivor benefit payable (to the participant's spouse, if married, or beneficiary is not married or if the spouse waives the death benefit) on or after the date the participant would have attained age 45.

(i) if a participant is married assuming the participant retired on the day before his death and elected a joint and 50% survivor benefit, and

(ii) if a participant is not married, assuming the participant was married with a spouse two years younger than the participant, the participant retired on the day before his death and elected a joint and 50% survivor benefit.

7. *Open Issue* The Benefits Board will remain intact with pilot representation and the pilot members will have joint signatory authority with CAL over release of benefit payment statements until annuities are purchased and in effect.

8. Any reversion (excess assets after purchase of the aforementioned annuity contract) upon termination of the A Plan will be paid to CAL.

9. Additional amounts shall be distributed from the A Plan to any participant or beneficiary to whom a distribution has been made since September 24, 1983 on a less than fully vested basis, within 30 days after the date of entry of this Order in an amount equal to the

difference between the distribution previously received and that which would have been received based upon the vesting provisions of this Order.

10. Upon entry of this Order, ALPA shall take such action as is appropriate to request a stay of that portion of *Air Line Pilots Association, International v. Continental Air Lines, Inc.*, Civ. Action No. H-84-1555, pending in the United States District Court for the Southern District of Texas, that relates to the A Plan, and upon the purchase of the annuity contract provided in paragraph "6" of this Order, ALPA shall take the appropriate steps to obtain the dismissal of such action that relates to the A Plan (with respect to all defendants in such action), all such action to be subject to the approval and direction of the United States District Court for the Southern District of Texas.

11. CAL shall be, and it hereby is, authorized and empowered to execute and deliver any documents, including, without limitation, the execution and delivery of documents memorializing and effectuating the provisions of paragraph "4" of this Order to the extent such provisions have not previously been made part of the A Plan and to take any further actions as may be necessary to effectuate the rejection and termination of the A Plan and the provisions of the Order as hereinabove provided.

12. In the event that distributions already made to participants who have terminated employment since the date of the Chapter 11 petition were calculated erroneously, giving such participants more than their proper share of the existing Plan funds, CAL or the Benefits Board shall have the right to seek further relief to insure equitable treatment of all Plan participants.

13. In the event a participant in the A Plan dies between March 9, 1984 and the first date benefits are paid out to any participant under the annuity contract referred to in paragraph 6 above, CAL shall pay to the

participant's beneficiary an amount equal to the difference between the death benefit payable under the A Plan prior to amendment on March 9, 1984 and the death benefit payable under the Plan as so amended.

14. The terms of the Plan shall not be further amended without the consent of ALPA, except as provided by this Order or as is necessary to retain its qualified status.

TXI Plan

1. The Texas International Airlines, Inc. Fixed Pension Plan for Pilots ("TXI Plan") be and it is rejected effective immediately prior to the commencement of the Chapter 11 case on September 24, 1983, provided that the TXI Plan shall not be terminated but shall be considered frozen effective as of September 24, 1983, as provided in an amendment of the TXI Plan dated March 9, 1984, to the extent not inconsistent with this Order.

2. CAL shall continue to administer the TXI Plan and its assets for the purposes hereafter set forth and shall take the actions hereafter provided to be taken, provided that CAL shall continue to comply with the terms of the Plan providing for notice to ALPA and the involvement of ALPA in making decisions relating to the Plan.

3. The TXI Plan shall be deemed technically amended in a manner satisfactory to CAL and to ALPA, to the extent not previously amended, providing for, among other things:

(a) Full vesting, for all participants who did not have a severance of employment prior to September 24, 1983, of all benefits accrued as of that date.

(b) Participants who were 40 years of age or older on September 24, 1983 will be eligible for subsidized early retirement benefits (using a 3% reduction in benefits for each year of benefit payments prior to age 60) upon termination of employment. Participants under 40 years of age on September 24, 1983 will be eligible for early retirement benefits upon termination of employment at age 42 (using a reduction in benefits for each year of benefits prior to age 60, based on an 8.5% per annum interest rate and the 1985 Group Annuity table). No benefit shall commence prior to the first day of the second month following the entry of the Order.

(c) Upon the death of any participant prior to March 9, 1984, the same death benefit shall be paid as would have been payable under the TXI Plan prior to its amendment on March 9, 1984.

4. The Plan shall not be amended, except as provided by this Order or as is necessary to retain its qualified status, without the consent of ALPA.

5. CAL may, at its option, provide for any benefits due under this Order, with regard to the participants in the TXI Plan, through a separate tax qualified plan which would be subject to the approval of ALPA.

6. Additional amounts shall be distributed from the Plan to any participant or beneficiary to whom a distribution has been made since September 24, 1983 on a less than fully vested basis, within 30 days after the date of entry of this Order in an amount equal to the difference between the distribution previously received and that which would have been received based upon the vesting provisions of the Order.

7. *Open Issue.* The Pension Committee will remain intact with pilot representation, and the Pension Committee will have joint signatory authority with Continental over release of benefit payment statements.

8. CAL shall fund the TXI Plan, and any alternate plan established pursuant to paragraph 6 of this Order, at a level not less than level annual payments that will fully amortize the cost of all benefits no later than December 31, 1995, using an assumed 11% interest rate and the 1985 Group Annuity table.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-86-1718

JOSEPH E. O'NEILL, *et al.*,
vs. *Plaintiffs,*

AIRLINE PILOTS ASSOCIATION INTERNATIONAL; CONTINENTAL AIRLINES MASTER EXECUTIVE COUNCIL; HENRY A. DUFFY; DENNIS M. HIGGINS; D. KIRBY SCHNELL; R. PETER LAPPIN and DONALD A. HENDERSON,
Defendants.

Complaint for Violation of Railway Labor Act
(20 U.S.C. § 141, *et seq.*);
Labor-Management Reporting and Disclosure
Act (29 U.S.C. § 401, *et seq.*); and State
Common Law Breach of Contract

FIRST AMENDED COMPLAINT

JURY IS DEMANDED

Upon personal knowledge or information and belief,
Plaintiffs allege:

INTRODUCTION

1. Plaintiffs are past and present Continental Airlines, Inc. pilots, and bring these claims against their union and various officers for: (1) breach of the duty of fair representation which Defendants owed to Plaintiffs under the Railway Labor Act; (2) violation of Plaintiffs' voting rights guaranteed under § 101(a)(1) of The Labor-

Management Reporting and Disclosure Act; (3) breach of fiduciary duties which Defendants owed to Plaintiffs under § 501 of the Labor-Management Reporting and Disclosure Act; (4) state common law breach of contractual obligations which Defendants owed to Plaintiffs. Plaintiffs seek leave of Court to bring their claims under § 501 of The Labor-Management Reporting and Disclosure Act; and both compensatory and punitive damages for their claims.

JURISDICTION AND VENUE

2. This Court has jurisdiction to hear these claims pursuant to § 301 of the National Labor Relations Act, 29 U.S.C. § 141, *et seq.*; § 102 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401, *et seq.*; 28 U.S.C. § 1337; and its jurisdiction to hear state law claims arising from the same common nucleus of operative facts as Plaintiffs' federal law claims.

3. Venue properly lies in this Court pursuant to § 102 of the Labor-Management Reporting and Disclosure Act and 28 U.S.C. § 1391.

4. Defendants caused events to occur in the Southern District of Texas out of which Plaintiffs' claims arise.

PARTIES

5. Plaintiffs are past or present Continental Airlines Corporation ("Continental") pilots and were represented by the Airline Pilots Association, International at all times from September 24, 1984, through October 31, 1985.

6. Airline Pilots Association, International ("ALPA") is an unincorporated association organized for the purposes and objectives of a labor organization. ALPA is a "representative" within the meaning of the Railway Labor Act, 45 U.S.C. § 141, *et seq.* and the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401,

et seq. ALPA has its principal office at 535 Herndon Parkway, Herndon, Virginia.

7. Continental Airlines Master Executive Council ("CAL MEC") was the coordinating body of ALPA for Continental pilots. CAL MEC consisted of the officers of the three local councils established by ALPA for Continental pilots. CAL MEC is currently under trusteeship by ALPA, and has an office at 1560 Drummett Boulevard, Houston, Texas.

8. Henry A. Duffy is a resident of Washington, D.C. or Georgia, and maintains his home office and residential mailing address at 535 Herndon Parkway, Herndon, Virginia. Duffy was ALPA's President at all times relevant hereto. Duffy was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983, through October 31, 1985; and at various other times issued instructions and caused events to occur in the Southern District of Texas through telephone calls and other communications thereto.

9. Dennis M. Higgins resides at 25515 Long Hill Lane, Spring, Texas, and at the times relevant hereto was the chairman and chief spokesperson for CAL MEC. Higgins also currently is CAL MEC's trustee. Higgins was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983, through October 31, 1985, and negotiated the secret agreement with Continental alleged herein within the Southern District of Texas.

10. D. Kirby Schnell resides at 6928 La Cadana, El Paso, Texas, and at the times relevant hereto was the chief negotiator for CAL MEC. Schnell was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983, through October 31, 1985, and negotiated the secret agreement with Continental alleged herein within the Southern District of Texas.

11. R. Peter Lappin is a resident of California and maintains his residential mailing address at P.O. Box 9460, Marina Del Rey, California. Lappin was the vice-chairman of CAL MEC at the times relevant hereto, and involved in the negotiations between CAL MEC and Continental. Lappin was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983, through October 31, 1985, and negotiated the secret agreement with Continental alleged herein within the Southern District of Texas.

12. Donald A. Henderson resides at 280 Bellingrath Park, Conroe, Texas, and at the times relevant hereto was involved in the negotiations for CAL MEC. Henderson was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983, through October 31, 1985, and negotiated the secret agreement with Continental alleged herein within the Southern District of Texas.

CLASS ACTION

13. Plaintiffs bring this action pursuant to Rule 23, Federal Rules of Civil Procedure, as a class action on behalf of the class of all Continental pilots who withdrew their services from Continental at any time from October 1, 1983, through October 31, 1985, and who were not working for Continental on October 31, 1985.

14. The members of the class are in a similar position to that alleged herein by the named Plaintiffs. The size of the class is believed to range from a minimum of three hundred to a maximum of thirteen hundred, and is such that joinder of even the minimum possible number of all class members is impracticable.

15. The claims of the named Plaintiffs and other class members involve common questions of law and fact which predominate over any questions affecting only individual

members of the class, and this class action is superior to other available methods for the fair and efficient adjudication of the controversy herein described.

16. The claims of the named Plaintiffs are typical of the claims of the class, and the named Plaintiffs will fairly and adequately protect the interests of this class.

GENERAL ALLEGATIONS

17. ALPA has been the exclusive collective bargaining representative under the Railway Labor Act for all Continental pilots since 1940. ALPA has negotiated numerous collective bargaining agreements with Continental during those many years. The most recent such agreement was entered into between Continental and ALPA in 1982.

18. On or about September 24, 1983, Continental filed bankruptcy and ceased abiding by its collective bargaining agreement with ALPA.

19. On or about October 1, 1983, ALPA commenced a strike against Continental and withdrew its members' services from Continental.

20. ALPA's strike was effectively terminated on October 31, 1985, as a result of an order issued by Bankruptcy Judge Roberts on that same date. Judge Roberts' order was based upon a secret agreement reached between the Defendants and Continental on or before October 31, 1985.

21. Defendants Duffy, Higgins, Schnell, Lappin and Henderson acted in the manner alleged throughout this complaint under color of authority given to them by ALPA and CAL MEC. Each of the Defendants was, at all times relevant to this Complaint, the agent, servant, representative or employee of every other Defendant and acting with the knowledge, consent and permission of every other Defendant.

22. Plaintiffs have no administrative or intra-union remedies sufficient to provide them the relief requested in this Complaint.

COUNT ONE

(Breach of Duty of Fair Representation)

23. Plaintiffs reallege and incorporate each and every allegation of the Complaint as if fully set forth in this Count.

24. ALPA was the exclusive representative of the Continental pilots, including all Plaintiffs, under the Railway Labor Act, 29 U.S.C. § 141 *et seq.*, at all times relevant hereto. CAL MEC was ALPA's coordinating body for the Continental pilots, including all Plaintiffs, at all times relevant hereto. In these capacities, ALPA and CAL MEC owed a duty of fair representation to all Continental pilots, including all Plaintiffs, at all times relevant to this Complaint.

25. During the course of the Continental strike, ALPA initiated numerous court claims (the "litigation") against Continental on behalf of all Continental pilots, including Plaintiffs. Without limitation, this litigation included: (1) unfair labor practice claims against Continental which, if successful, would have guaranteed every striking Continental pilot, including Plaintiffs, the opportunity to return to work at Continental in order of seniority and without loss of pay; (2) attempts to enforce a side-letter agreement reached between ALPA and Continental's corporate parent, Texas Air Corporation ("TAC") for the benefit of ALPA's members which, if successful, would have guaranteed payment to all striking Continental pilots, including Plaintiffs, of the wages and benefits they lost when Continental ceased operating under its collective bargaining agreement with ALPA; (3) a civil RICO suit alleging that Continental and others fraudulently schemed to avoid Federal Air Regulations in order to gain an unfair bargaining advantage over ALPA.

during the Continental strike which, if successful, would have awarded all Continental pilots, including Plaintiffs, treble their actual damages suffered as a result of those schemes; (4) an appeal seeking to dismiss Continental's bankruptcy as having been filed in bad faith; and (5) an appeal seeking to reverse the Bankruptcy Court's order authorizing Continental to reject its collective bargaining agreement with ALPA.

26. From the inception of the Continental strike, ALPA guaranteed all Continental pilots its unfaltering support in reaching an agreement with Continental that would protect all pilot's seniority. ALPA reaffirmed this pledge throughout the strike, and correctly recognized that seniority was the top bargaining priority of its members.

27. Throughout the strike, ALPA also guaranteed its unfaltering support of all litigation it filed against Continental and TAC. ALPA expressly recognized that it filed these claims on behalf of its Continental pilot members, and that litigation was the only means available to secure valuable rights for those members.

28. ALPA had the support of a large majority of its pilots, not just those employed by Continental, for the Continental strike and ALPA's stated bargaining goals. ALPA's membership authorized ALPA to assess each pilot an amount sufficient to provide strike benefits to each Continental pilot through the duration of the Continental strike.

29. In September 1985, CAL MEC held an important meeting in Washington, D.C., pertaining to the Continental strike. At that meeting, Higgins, on instructions from ALPA President Duffy, attempted to persuade CAL MEC to end its strike against Continental. CAL MEC, however, acting on behalf of all Continental pilots, voted to continue the strike and reaffirmed the importance of reaching an agreement that protected each pilot's seniority before terminating the strike.

30. Also at the September meeting in Washington, D.C., CAL MEC discussed and mapped out its negotiating strategy. CAL MEC resolved that it would continue the strike, and authorized Higgins and Schnell as its bargaining representatives to continue negotiations with Continental. CAL MEC expressly instructed Higgins and Schnell not to reach an agreement unless such agreement protected all pilots' seniority and allowed ALPA, on behalf of the Continental pilots, to continue the litigation against Continental and TAC. CAL MEC further instructed Higgins and Schnell not to appoint Judge Roberts to arbitrate any unresolved issues. Lappin and Henderson thereafter participated in and supported the negotiations with Continental in concert with Higgins and Schnell. Hereinafter, the "negotiating team" refers to Higgins, Schnell, Lappin and Henderson.

31. In late October 1985, and perhaps before that time, ALPA or its representatives reached a secret agreement with Continental to settle the strike. This secret agreement eliminated the pilots' seniority rights and dismissed with prejudice all ALPA litigation against Continental and TAC. The ALPA representatives and Continental further agreed to present their secret agreement to Judge Roberts as an interest arbitrator for his rubber-stamp approval, rather than submitting the proposal to CAL MEC or to the Continental pilots for a vote.

32. Sometime thereafter, ALPA directed the negotiating team to adopt the secret agreement between ALPA and Continental. Duffy told the negotiating team that he would place CAL MEC in trusteeship and terminate the Continental strike if they did not approve this agreement. The negotiating team thereafter did so without ratification by CAL MEC or the Continental pilots.

33. ALPA's secret agreement with Continental, as adopted by the negotiating team, divested the pilots of their seniority rights, and may prejudice their rights pur-

sued in the litigation against Continental and TAC. Among other things, the agreement: (1) required pilots to waive claims against Continental and TAC in order to preserve their right to be recalled in seniority order; (2) discriminated in favor of nonstriking pilots and against recalled striking pilots in the award of future captain vacancies regardless of seniority; (3) discriminated against returning strikers by restricting their seniority rights to bid for assignments of initial status equipment and base; (4) discriminated against pilots who elected to retain their contractual claims against Continental and TAC by allowing them to be recalled only after pilots who waived their claims, regardless of seniority; (5) continued strike benefits, prior to recall, only to pilots who waived all claims against Continental and TAC; (6) terminated recall rights after December 31, 1988; and (7) eliminated recall rights of retired and resigned Continental pilots and restricted the recall rights of disabled pilots. The secret agreement also violated CAL MEC's right to consider any strike settlement agreement, and the Continental pilots' right to vote on its ratification by appointing Judge Roberts to order its terms as an interest arbitrator.

34. Duffy orchestrated the secret agreement with Continental in order to terminate the strike against Continental and strengthen his political position as President of ALPA; and also in order to protect his personal interests in avoiding any potential personal liability in civil RICO claims that Continental filed against ALPA. Higgins approved the agreement based upon its inclusion of a provision that changed the Continental pilots' retirement age and status for his personal benefit. Schnell approved the agreement based upon its inclusion of severance pay to certain pilots on conditions beneficial to him.

35. ALPA, CAL MEC, Duffy, and the negotiating team all acted beyond the authority conferred upon them

by ALPA's membership to negotiate a settlement, and contrary to the best interests of all Continental pilots. Defendants' conduct in reaching the secret agreement with Continental and presenting it to Judge Roberts for his order was arbitrary, discriminatory, and motivated by bad faith. Defendants thus breached the duty of fair representation they owed to all Continental pilots, including Plaintiffs, in violation of the Railway Labor Act.

36. Sometime since October 31, 1985, ALPA has distributed new union membership cards to some of its Continental pilot members. ALPA has refused, however, to issue new membership cards to others of its Continental pilot members, including many of these Plaintiffs. ALPA thereby has acted arbitrarily, discriminatorily and in bad faith to deny to some of its members, including Plaintiffs, the privileges and benefits of union membership which ALPA has extended to others of its members. ALPA thus has further breached the duty of fair representation it owes to all its members, including Plaintiffs.

37. Plaintiffs have been damaged by Defendants' breaches of their duty of fair representation in a manner and in amounts which will be proven at trial.

COUNT TWO

(Violation of the
Labor-Management Reporting and
Disclosure Act, 49 U.S.C. § 411,
et seq.)

38. Plaintiffs reallege and incorporate each and every allegation of the Complaint as if fully set forth in this Count.

39. Section 101 of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411, sets forth the labor "Bill of Rights" that applies to all em-

ployees, such as Plaintiffs, who are represented by unions, such as ALPA. Among these rights, the LMRDA guarantees union members the right to vote on collective bargaining agreements where their union constitutions so provide.

40. ALPA's Constitution and By-Laws ("Constitution") provides that "the conclusion of an agreement shall, at the discretion of the individual Master Executive Counsel, be subject to ratification." ALPA Constitution and By-Laws at Article XVIII, Section 2, page 58. CAL MEC, in turn, resolved in September 1983 to grant all Continental pilots the right to ratify all agreements with Continental.

41. Defendants reached a secret strike settlement agreement with Continental without allowing Continental pilots to vote on ratification. Defendants thereby denied all Continental pilots, including Plaintiffs, valuable rights expressly guaranteed to them by ALPA and CAL MEC, and protected by the LMRDA. Defendants acted intentionally, recklessly, and in wanton disregard of the Continental pilots' rights under ALPA's Constitution and the LMRDA in denying them their right to a ratification vote.

42. Plaintiffs have been damaged by Defendants' conduct in a manner and in amounts which will be proven at trial. These damages include, without limitation, the loss of their valuable seniority rights and the potential dismissal with prejudice of all litigation which ALPA filed on their behalf against Continental and TAC. Plaintiffs are entitled to be compensated by Defendants for these damages, and are further entitled to an award of punitive damages against Defendants in an amount sufficient to deter them and others similarly situated from violating the LMRDA and depriving employees of their rights thereunder in the future.

COUNT THREE

(Breach of Fiduciary Duty in
Violation of Labor-Management
Reporting and Disclosure Act, 29
U.S.C. § 411 *et seq.*)

43. Plaintiffs reallege and incorporate each and every allegation of their Complaint as if fully set forth in this Count.

44. Section 501 of the LMRDA imposes fiduciary duties on unions and union representatives in all dealings with and on behalf of union members. Defendants therefore owed fiduciary duties to Plaintiffs in their negotiations with Continental and in all related activities.

45. Beginning in early summer 1985, ALPA or its representatives met secretly with representatives of Continental to negotiate a strike settlement agreement. ALPA breached its fiduciary duties to all Continental pilots by failing to report the occurrence of these secret meetings and the subject of their discussions to them or to CAL MEC.

46. Sometime after ALPA's secret meetings with Continental, Duffy breached his fiduciary duties to all Continental pilots by, among other things, threatening to place CAL MEC in trusteeship if its negotiators failed to approve and finalize ALPA's secret agreement with Continental.

47. Sometime prior to October 1985, CAL MEC, on behalf of all Continental pilots, charged Defendants Higgins and Schnell with the duty to negotiate a strike settlement agreement that would preserve all Continental pilots' seniority rights and all litigation filed against Continental and TAC, and that did not leave issues to be arbitrated by Judge Roberts. CAL MEC, on behalf of all Continental pilots, also charged Higgins and Schnell with responsibilities to report all negotiations and potential agree-

ments to CAL MEC. Defendants Higgins and Schnell were obligated by the LMRDA to discharge these negotiating duties as fiduciaries of all Continental pilots. Lappin and Henderson assumed these same fiduciary obligations through their participation in the negotiations with Continental.

48. The negotiating team breached its fiduciary duties to the Continental pilots, including Plaintiffs, by: (1) meeting secretly with Continental and Judge Roberts in attempts to settle the Continental strike on terms contrary to those approved by CAL MEC and its members; (2) reaching a secret agreement that terminated the Continental pilots' seniority rights and that attempted to dismiss with prejudice all litigation ALPA filed on their behalf against Continental and TAC; (3) failing to report negotiations to CAL MEC, on behalf of all Continental pilots; (4) presenting their secret agreement to Judge Roberts as an interest arbitrator; and (5) conspiring to deprive the Continental pilots of their right to ratify any strike settlement agreement. ALPA and CAL MEC breached their fiduciary duties to the Continental pilots, including Plaintiffs, by knowingly or negligently allowing the negotiating team to engage in such conduct under color of their authority.

49. All Defendants further breached their fiduciary duties to the Continental pilots, including Plaintiffs, by failing to disclose the full meaning and ramifications of the agreement which was embodied in Judge Roberts' October 31, 1985, order in a manner sufficient to allow each Continental pilot to understand its terms and make important decisions required thereunder in an informed manner.

50. ALPA breached its fiduciary duties by arbitrarily placing CAL MEC in trusteeship in early November 1985, and thereby depriving all Continental pilots of any viable means to protest Defendants' bargaining behavior, or to

understand and exercise their rights under Judge Roberts' Order.

51. Plaintiffs have been damaged by Defendants' breaches of the fiduciary duties owed to them, in a manner and amounts which will be proven at trial. Plaintiffs are entitled to be compensated by Defendants for these damages; and are further entitled to an award of punitive damages against Defendants in an amount sufficient to deter them and others similarly situated from breaching their fiduciary duties to union members under the LMRDA in the future.

52. Plaintiffs seek leave of Court, for good cause as alleged in this verified Complaint, to pursue their claims against Defendants for breach of fiduciary duty pursuant to § 501 of the LMRDA.

COUNT FOUR

(Breach of Contract/Tortious
Breach of Contract)

53. Plaintiffs reallege and incorporate each and every allegation of their Complaint as if fully set forth in this Count.

54. ALPA's Constitution imposes contractual obligations between ALPA and its members, including all Continental pilots. CAL MEC's governing documents similarly impose contractual obligations between CAL MEC and all Continental pilots.

55. ALPA's Constitution expressly guarantees all pilots the right to ratify all agreements if their respective Master Executive Councils so provide. CAL MEC expressly promised Continental pilots the right to ratify all agreements with Continental.

56. ALPA's Constitution expressly provides that minutes and records of attendance must be kept at all meet-

ings of every Master Executive Counsel, including CAL MEC.

57. ALPA's and CAL MEC's contractual obligations to all Continental pilots, including Plaintiffs, contained an implied covenant of good faith and fair dealing.

58. ALPA and CAL MEC breached their contractual obligations to the Continental pilots, including Plaintiffs, by not allowing them to vote on the agreement reached with Continental. Both ALPA and CAL MEC also breached the implied covenant of good faith and fair dealing which they owed to all Continental pilots, including Plaintiffs, by this same conduct.

59. CAL MEC breached its contractual obligations to the Continental pilots, including Plaintiffs, by failing to keep minutes of all meetings, which in turn deprived them of adequate notice and information regarding the collective bargaining negotiations with Continental.

60. Plaintiffs have been damaged by Defendants' contractual breaches, in a manner and in amounts to be proven at trial.

61. ALPA and CAL MEC breached their contractual obligations to the Continental pilots willfully, intentionally, in bad faith and, therefore, tortiously. Plaintiffs thus also are entitled to an award of punitive damages against Defendants in an amount sufficient to deter them and others similarly situated from such tortious conduct in the future.

WHEREFORE, Plaintiffs individually and as a class request the following relief:

- A. Leave of Court to bring this action against Defendants, pursuant to § 501 of the Labor-Management Reporting and Disclosure Act;
- B. Judgment in an amount sufficient to compensate Plaintiffs for all damages suffered as a result of Defendants' conduct alleged in Counts 1-4;

- C. Judgment in an amount sufficient to deter Defendants and others similarly situated from the conduct alleged in Counts 2-4;
- D. An award of all attorneys' fees Plaintiffs have incurred to bring these claims;
- E. An award of all costs Plaintiffs have incurred to bring these claims; and
- F. All other relief which the Court deems just and proper.

RESPECTFULLY SUBMITTED this — day of May, 1986.

LEWIS AND ROCA

By _____

MARTY HARPER
ALLEN R. CLARKE
100 West Washington,
Ste. 2300
Phoenix, Arizona
85003-0000
(602) 262-5311

LEONARD KOEHN HURT
SCHWEINLE STRAWN &
INGOLDSBY

By _____

WILLIAM E. SCHWEINLE, JR.
State Bar #17876000
REGINALD H. WOOD
State Bar #2190550
Suite 150
6750 West Loop South
Bellaire, TX 77401
(713) 661-3488

STATE OF ARIZONA)
) ss. VERIFICATION
 County of Maricopa)

JACK E. PENDLETON, being first duly sworn upon his oath, deposes and says:

That is a former pilot for Continental Airlines, Inc.; that he was a member in good standing of, and represented by, the Airline Pilots Association International and the Continental Airlines Master Executive Council, at all times set forth in the foregoing First Amended Complaint; that he is one of the plaintiffs named in the foregoing First Amended Complaint; that he has read the foregoing First Amended Complaint and knows the contents thereof; that the factual matters alleged therein are true and correct based upon his personal knowledge or his information and belief; that as to those factual matters alleged upon personal information and belief, he believes them to be true; and that he makes the legal conclusions alleged therein upon advice of counsel.

 JACK E. PENDLETON

SUBSCRIBED AND SWORN to before me this ____
 day of May, 1986.

 Notary Public

My Commission
 Expires:

STATE OF ARIZONA)
) ss. VERIFICATION
 County Of Maricopa)

PHILIP M. ORDWAY, being first duly sworn upon his oath, deposes and says:

That he is a former pilot for Continental Airlines, Inc.; that he was a member in good standing of, and represented by, the Airline Pilots Association International and the Continental Airlines Master Executive Council, at all times set forth in the foregoing First Amended Complaint; that he is one of the plaintiffs named in the foregoing First Amended Complaint; that he has read the foregoing First Amended Complaint and knows the contents thereof; that the factual matters alleged therein are true and correct based upon his personal knowledge or his information and belief; that as to those factual matters alleged upon personal information and belief, he believes them to be true; and that he makes the legal conclusions alleged therein upon advice of counsel.

PHILIP M. ORDWAY

SUBSCRIBED AND SWORN to before me this ____
 day of May, 1986.

Notary Public

My Commission
 Expires:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-86-1718

JOSEPH E. O'NEILL, *et al.*,
vs. *Plaintiffs,*

AIRLINE PILOTS ASSOCIATION INTERNATIONAL; CONTI-
NENTAL AIRLINES MASTER EXECUTIVE COUNCIL;
HENRY A. DUFFY; DENNIS M. HIGGINS; D. KIRBY
SCHNELL; R. PETER LAPPIN and DONALD A. HENDER-
SON, *Defendants.*

ANSWER

Defendants, by their attorneys, Mudge Rose Guthrie Alexander & Ferdon, for their answer to the First Amended Complaint herein (the "complaint"), allege as follows:

1. Deny the allegations contained in paragraph 1 of the complaint, except to state that plaintiffs have filed a complaint purporting to allege those claims described in said paragraph 1.
2. Deny the allegations contained in paragraphs 2, 3, and 4 of the complaint.
3. Deny the allegations contained in paragraph 5 of the complaint except to state that plaintiffs are past or present Continental Airline Corporation ("Continental") pilots.
4. Deny the allegations contained in paragraph 6 of the complaint except to state that the Air Line Pilots Association, International ("ALPA") is an unincorporated

association organized for the purposes and objectives of a labor organization, that ALPA is a "representative" within the meaning of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and that ALPA has its principal office at 535 Herndon Parkway, Herndon, Virginia.

5. Deny the allegations contained in paragraph 7 of the complaint except to state that the Continental Airlines Master Executive Council ("CAL MEC") was the coordinating body of ALPA for Continental pilots.

6. Deny the allegations contained in paragraph 8 of the complaint except deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in the last clause of paragraph 8 of the complaint and except to state that Defendant Duffy is a resident of the State of Georgia, that he has been president of ALPA since January 1, 1983 and that he was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983 through October 31, 1985.

7. Deny the allegations contained in paragraph 9 of the complaint except admit Defendant Higgins has a residence at the specified address, that he was the chairman of the CAL MEC from October 1983 through November 8, 1985, and that he was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983 through October 31, 1985.

8. Deny the allegations contained in paragraph 10 of the complaint except admit Defendant Schnell has a residence at the specified address, that he was chairman of the committee negotiating with Continental with respect to the Continental strike from June 1, 1985 until the end of that strike and that he was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983 through October 31, 1985.

9. Deny the allegations contained in paragraph 11 of the complaint except admit Defendant Lappin has a residence in California and maintains a mailing address at the specified mailing address, that he was vice chairman of the CAL MEC from March 1981 through November 8, 1985, that he served on the committee negotiating with Continental with respect to the Continental strike and that he was present in the Southern District of Texas in connection with the Continental strike at various times from September 24, 1983 through October 31, 1985.

10. Deny the allegations contained in paragraph 12 of the complaint except admit Defendant Henderson has a residence at the specified address, that he served on the committee negotiating with Continental with respect to the Continental strike and that he was present in the Southern District of Texas in connection with Continental strike at various times from September 24, 1983 through October 31, 1985.

11. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint, except to state that plaintiffs purport to bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedures on behalf of the class defined in said paragraph 13.

12. Deny the allegations contained in paragraphs 14, 15 and 16 of the complaint.

13. Admit the allegations contained in paragraphs 17, 18, and 19 of the complaint.

14. Deny the allegations contained in paragraph 20 of the complaint, except admit that the strike was effectively terminated on October 31, 1985 as a result of an Order and Award issued by Bankruptcy Judge Roberts on that same date and except to further state that said Order and Award included as part thereof certain matters that had been tentatively agreed to between ALPA

and Continental as more fully described in paragraph 25 hereof.

15. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 21 of the complaint except to state that those actions taken by Defendants Duffy, Higgins, Schnell, Lappin and Henderson in connection with the Continental strike and its resolution were properly authorized actions.

16. Deny the allegations contained in paragraph 22 of the complaint.

17. With respect to the allegations contained in paragraph 23 of the complaint, defendants repeat and reallege each and every answer to the complaint as though fully set forth in answer to this paragraph of the complaint.

18. Deny the allegations contained in paragraph 24 of the complaint.

19. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 25 of the complaint except to admit that during the course of the Continental strike, ALPA initiated several legal actions against Continental; and the Court and the parties are respectfully referred to the pleadings in those actions for an accurate description thereof.

20. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 26 of the complaint except to state that ALPA gave its unfaltering support to its member pilots employed by Continental in their efforts to reach an agreement that would, to the extent possible under the circumstances, protect the pilots' seniority, that ALPA reaffirmed this support throughout the strike and that ALPA believed that seniority was a top bargaining priority of its members.

21. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 27 of the complaint except to state that ALPA gave its unfaltering support to the litigation it commenced during the Continental strike.

22. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 28 of the complaint except to state that many in ALPA's membership supported the Continental strike and that the ALPA membership from time to time authorized ALPA to make certain assessments necessary to provide very substantial strike benefits during the Continental strike.

23. Deny the allegations contained in paragraph 29 of the complaint except to state that a meeting of the CAL MEC took place in Washington, D.C., in September, 1985, that a resolution to end the Continental strike was not passed, that a resolution was passed providing, *inter alia*, that a "return to work in order of system seniority is a matter of paramount concern," and that a resolution was passed giving the MEC officers and MEC negotiating committee chairman the authority to reach a resolution with respect to the issues then outstanding in connection with the Continental strike.

24. Deny the allegations contained in paragraph 30 of the complaint except to state that members of CAL MEC discussed at the September meeting certain issues relevant to the Continental strike, that the MEC officers and MEC negotiating committee chairman were authorized to reach a resolution with respect to the issues then outstanding in connection with the Continental strike, and that defendants Lappin and Henderson participated with Higgins and Schnell in the efforts to reach such a resolution.

25. Deny the allegations contained in paragraph 31 except to state that Defendants Higgins, Schnell, Lappin

and Henderson negotiated tentative agreements with Continental as to certain issues, which tentative agreements were subject to an entire agreement being reached, that an entire agreement never was reached between the parties, and that the Order and Award issued by Judge Roberts included as part thereof those matters which had been tentatively agreed to between the parties.

26. Deny the allegations contained in paragraph 32 of the complaint.

27. Deny the allegations contained in paragraph 33 of the complaint except to state that to the extent said paragraph seeks to summarize provisions of Judge Roberts' Order and Award, the Court and the plaintiffs are respectfully referred to the provisions of said Order and Award, as amended, for the terms thereof.

28. Deny the allegations contained in paragraphs 34 through 37 of the complaint.

29. With respect to the allegations contained in paragraph 38 of the complaint, [defendants] repeat and reallege each and every answer to the complaint as though fully set forth in answer to this paragraph of the complaint.

30. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 39 of the complaint in that this paragraph calls for a legal conclusion.

31. Deny the allegations contained in paragraph 40 of the complaint except to state that ALPA's constitution and by-laws contains the language quoted in paragraph 40 of the complaint.

32. Deny the allegations contained in paragraphs 41 and 42 of the complaint.

33. With respect to the allegations contained in paragraph 43 of the complaint, [defendants] repeat and real-

lege each and every answer to the complaint as though fully set forth in answer to this paragraph of the complaint.

34. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 44 of the complaint in that this paragraph calls for a legal conclusion.

35. Deny the allegation contained in paragraph 45 of the complaint except to state that certain representatives of ALPA met with representatives of Continental at various times to negotiate a settlement of the Continental strike.

36. Deny the allegations contained in paragraphs 46 through 52 of the complaint.

37. With respect to the allegations contained in paragraph 53 of the complaint, [defendants] repeat and re-lege each and every answer to the complaint as though fully set forth in answer to this paragraph of the complaint.

38. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 54 of the complaint in that this paragraph calls for a legal conclusion.

39. Deny the allegations contained in paragraph 55 of the complaint except to state that ALPA's constitution and by-laws contains the language quoted in paragraph 40 of the complaint.

40. Admit the allegations contained in paragraph 56 of the complaint.

41. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 57 of the complaint in that this paragraph calls for a legal conclusion, except to state that at all times defendants acted in good faith and dealt fairly with all of ALPA's member pilots.

42. Deny the allegations contained in paragraph 58 through 61 of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

43. The complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

44. The claims alleged herein are barred by the applicable statute of limitations.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

45. Plaintiffs' claims are barred by the doctrines of *res judicata* and/or collateral estoppel as a result of the proceedings and orders of the Bankruptcy Court of the Southern District of Texas.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

46. Plaintiffs' claim as set forth in Count III of the complaint has not been properly commenced because plaintiffs failed to satisfy the statutory conditions precedent for commencing such an action.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

47. Plaintiffs' claim as set forth in Counts I, II, and IV may not, as a matter of law, be brought against the individual defendants or CAL MEC.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

48. Plaintiffs' claims as set forth in Count III may not, as a matter of law, be brought against Defendants ALPA or CAL MEC.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

49. Punitive damages, as a matter of law, are not recoverable.

**AS AND FOR AN EIGHTH AFFIRMATIVE
DEFENSE**

50. Plaintiffs' claims may not be maintained against the CAL MEC because the CAL MEC is not a legal person or entity and lacks the capacity to be sued.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

51. This Court lacks jurisdiction over the person of the CAL MEC.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

52. There was insufficient service of process with respect to the CAL MEC in that plaintiffs failed to effect proper service of the summons and complaint upon the CAL MEC.

**AS AND FOR AN ELEVENTH AFFIRMATIVE
DEFENSE**

53. Plaintiffs' claim as set forth in Count IV of the complaint is barred by the doctrine of federal preemption.

**AS AND FOR A TWELFTH AFFIRMATIVE
DEFENSE**

54. Plaintiffs' claims are barred as a result of their having failed to exhaust available internal union remedies.

**AS AND FOR A THIRTEENTH AFFIRMATIVE
DEFENSE**

55. Plaintiffs' claims are barred in that they are a collateral attack on the proceedings, orders and awards of the Bankruptcy Court of the Southern District of Texas and are an improper effort to appeal, modify and challenge those proceedings, orders and awards.

**AS AND FOR A FOURTEENTH AFFIRMATIVE
DEFENSE**

56. Plaintiffs' claims are barred to the extent that those acts which are alleged to be improper were re-

quired by orders issued by the Bankruptcy Court of the Southern District of Texas.

**AS AND FOR A FIFTEENTH
AFFIRMATIVE DEFENSE**

57. Plaintiffs, as individuals, are not entitled to recover damages on account of the claims set forth in Count III of the complaint.

**AS AND FOR A SIXTEENTH
AFFIRMATIVE DEFENSE**

58. To the extent plaintiffs are, or seek to represent, Continental pilots who retired and/or resigned prior to October 31, 1985, plaintiffs lack standing to prosecute the claims alleged in the complaint.

**AS AND FOR A SEVENTEENTH
AFFIRMATIVE DEFENSE**

59. To the extent plaintiffs are, or seek to represent, Continental pilots who retired and/or resigned prior to October 31, 1985, the claims set forth in the complaint are barred under the doctrine of waiver.

WHEREFORE, defendants demand judgment dismissing the complaint herein, together with their costs and disbursements, including their attorneys' fees, and such other and further relief as to this Court seems just and proper.

Dated: New York, New York
July 31, 1986

JED S. RAKOFF
Attorney-In-Charge
Mudge Rose Guthrie
Alexander & Ferdon
180 Maiden Lane
New York, New York
10038
212-510-7000

Designated
Co-Counsel:

John A. Irvine
Porter & Clements
3500 RepublicBank Center
Houston, Texas 77002
713-226-0621

Certificate of Service

I certify that a true and correct copy of the foregoing Answer was served on counsel for plaintiffs, Reginald H. Wood and William E. Schweinle, Jr., Leonard, Koehn, Hurt, Schweinle, Strawn & Ingoldsby, Suite 150, 6750 West Loop South, Bellaire, Texas 77401, by first-class mail this 31st day of July, 1986.

JOHN A. IRVINE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-86-1718

JOSEPH E. O'NEILL, PHILLIP M. ORDWAY, JACK E. PENDELTON, CHARLES RICE, WILLIAM S. AGEE, D. L. BAKER, JAMES D. BATEMAN, H. M. BAUER, ROBERT F. BEAGLE, JAMES H. BEERER, MICHAEL J. BERNARDO, DAVID L. BIGELOW, DONALD G. BJORKLUND, WALTER E. BLORE

versus

AIRLINE PILOTS ASSOCIATION INTERNATIONAL, CONTINENTAL AIRLINES MASTER EXECUTIVE COUNSEL, HENRY A. DUFFY, D. KIRBY SCHNELL, R. PETER LAPPIN, DONALD A. HENDERSON

Houston, Texas
November 30th, 1987 2:30 P.M.

COURT'S RULING

BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Defendants:

Mudge, Rose, Guthrie, Alexander & Ferdon

By: Mr. Harold G. Levison
Ms. Patricia A. Griffin
180 Maiden Lane
New York, New York 10038

Boyar, Norton, & Blair

By: Mr. John A. Irvine
Five Post Oak Park
Houston, Texas 77027

For the Plaintiffs:

Lewis & Roca

By: Mr. Marty Harper
Mr. Allen R. Clarke
Mr. Steven J. Hulsman
First Interstate Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003-1899

Stubbman, McRae, Sealy & Browder, Inc.

By: Mr. Reginald H. Wood
2400 Republicbank Center
Houston, Texas 77002

THE COURT: Thank you. Be seated.

Even though the hour is late, I am going to give a general outline of my judgment in this case and produce a written document. The written document may vary a little because I may omit things or modify it, but I think the parties, for their own purposes, need to know the general nature of the resolution as soon as possible.

I am going to grant the Defendant's Motion For Summary Judgment.

I think the order signed by Judge Roberts is inescapably an order. Under the circumstances of the existing bankruptcy law since there was little that Continental could do without the approval of the Court, the approval of the Court in this instance, however minor, the Court's contribution to the terms of the resolution, the Court's participation was essential.

Now, that's a fairly narrow holding and I am not saying all agreed orders are not contracts and similar things, but under the circumstances of this case, beyond that, in the alternative, I am not going to rule under Count 1 on

the nature of the resulting relationship between Continental and a retired pilot because the retirement questions are subjudice elsewhere.

So assuming that the October 31 transaction were merely an agreement, the Court finds that the Union did not breach its duty of fair representation.

There is nothing to indicate that the Union made any choices among the Union members or the strikers who were not Union members other than on the best deal that the Union thought it could construct; that the deal is somewhat less than not particularly satisfactory is not relevant to the issue of fair representation.

In Count 2, the equality within the craft under the cases apparently precludes that claim.

As I've indicated before, that in no way means that either Congress or the Court intended to cleanse or approve of failing to do something that they should do to everyone.

That may save it from that statutory violation, but that's not an endorsement of practice.

The variation on the theme in Count 3 under the various sections of the statutes has the same result and that is that the activities of the Union may be characterized as sloppy, ineffectual, short-sighted or some other value judgmental result, but that is not the same as to say it is a violation of a statutory duty to any particular pilot or group of pilots.

The Court is concerned about the August 1984 resolution being secret. It, of course, was not secret from the 9-member committee who purportedly represented the Union, but I do not think it is properly part of the policy of this operating division of ALPA.

However, that's not much comfort to the Plaintiffs because what was done through other meetings was sufficient, I think, to confer authority on the negotiating agents for the MEC, who were the general agents for the membership.

I have seen nothing in the documents that would preclude the conferring of a plenary binding general agency on some representative sent to negotiate the contract, whether it's a working agreement or a back-to-work agreement.

The Court does not then need to decide whether a working agreement is categorically different from a back-to-work agreement in this case and, therefore, not subject to the strictures of Section 17 Policy Manual.

It seems to the Court that the circumstances, it would make a back-to-work agreement susceptible to short, dead lines, crises of operation, crises of administration and other limitations in the orderly process of the Union would also frequently be true of the ordinary working agreement negotiations.

The failure of the Union to follow a number of the procedural steps, while bad practice and undesirable policies, does not amount in this case as a matter of law to a breach of fiduciary duty.

Since the agreement that was achieved looks atrocious in retrospect, but it is not a breach of fiduciary duty badly to settle the strike and I suspect if all the parties had it all to do all over again, most of them would have adopted different tactics throughout the entire labor problems with Continental.

The loss to the Plaintiffs, while not technically money or property under the cases, are rights of considerable economic importance.

Count 4 which I earlier characterized as a common law breach of fiduciary duty falls for essentially the same underlying, undisputed fact reasons that the statutory claims under Count 3 fall and that is that none of the statutes nor common law entitle the pilots to a risk-free choice in their decisions in dealing with what was indisputably a hostile intransigent employer.

It is only natural and human for the pilots to feel displeased with the Union. That does not amount to a

breach of the Union's fiduciary duty to this group or its individual components.

I don't think that the behavior of the Union has been shown to have any segment of proclivity to it except in the pilots' view that they ultimately end up cooperating with Continental Airlines.

From that fact alone and from the fact that they used every tactic available to them to insure that their resolution of the dispute would not be upset cannot be translated into personal animosity or illegal motives against these pilots.

Although I don't think the Court needs to reach it, the Court is somewhat troubled by the argument that ratification was not necessary because it wasn't a labor agreement because we didn't cover everybody and couldn't cover everybody because we weren't the bargaining agent any more.

That seems to me to be fairly circular and to say it was all right to violate your agency with these pilots because to attempt to represent them completely would have required that you violate the Railway Labor Act and to put it ahead of their policies doesn't seem substantial.

I don't understand the labor law to have precluded the Union from having discussed the future of non-Union strikers or other conditions and terms of Continental's employment practices that might affect people other than their direct membership.

If I am wrong about that, you can supply me a case; but so far I have not understood anything in these statutes to have precluded the Union from structuring a larger settlement than its membership alone, and I'm obviously not deciding whether or not ALPA was the designated bargaining representative for Continental at this time. That's covered by the other case, too, I believe.

All right. That may not be as lucid as it ought to be, but I'm either sorry or grateful that I do not spend as

much time in labor law as you gentlemen do. I am sorry you counsel do, but I will try to write it down so it will make sense and you can file your Motion For Reconsideration.

Anything further this afternoon?

MR. LEVISON: No, Your Honor.

MR. HARPER: Thank you, Your Honor.

THE COURT: Thank you, counsel.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-2848

JOSEPH E. O'NEILL, *et al.*,
Plaintiffs-Appellants,

v.

AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas

Oct. 31, 1989

Marty Harper, Allen R. Clarke, Lewis & Roca, Phoenix, Ariz., William E. Schweinle, Jr., Reginald H. Wood, Stubberman, McRae, Sealy, Laughlin & Browder, Houston, Tex., for plaintiffs-appellants.

Harold G. Levison, Mudge, Rose, Guthrie, Alexander & Ferdon, New York City, John A. Irvine, Thelen, Marrin, Johnson & Bridges, Houston, Tex., for defendants-appellees.

Before POLITZ, DAVIS and DUHE, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Joseph O'Neill, et al., (the O'Neill Group or the pilots) appeal from the district court's grant of summary judgment dismissing their action against the Air Line Pilots Association (ALPA). We vacate the district court's dismissal of the pilots' unfair representation claim, and remand the case to the district court for further proceedings on this count. We affirm the district court's dismissal of the pilots' claim for relief under section 101 (a) (1) of the Labor-Management Reporting and Disclosure Act (LMRDA).

I.

This dispute arises out of the settlement of a two-year strike by ALPA against Continental Air Lines (CAL). The O'Neill Group were ALPA members employed as pilots by CAL, and participated in the strike against the airline.

ALPA has been the authorized and exclusive bargaining representative for the airline pilots employed by Continental Air Lines and its corporate predecessors since the 1940s. CAL and ALPA adopted their most recent collective bargaining agreement in 1982. In 1983, CAL waged a campaign to win substantial financial concessions from its employee groups, including CAL pilots. CAL and the pilots' union ultimately failed to reach a concession agreement and in September 1983, CAL filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101, et seq. CAL then repudiated its existing collective bargaining agreements with ALPA and its other unions, and unilaterally implemented its previously requested concessions as "emergency work rules," including cuts of more than fifty percent in pilots' salaries and benefits.

In October 1983, ALPA, initiated a lawful pilot strike in response to CAL's rejection of its labor contract, and filed suit under the Railway Labor Act, 45 U.S.C. § 151, et seq. (RLA), to enforce the collective bargaining provisions. The strike lasted for more than two years, during

which time CAL continued to operate by employing cross-overs and hiring large numbers of permanent replacement pilots. The number of working pilots grew; by August 1985, working pilots at CAL exceeded the number of strikers 1,600 to 1,000.

In June 1984, after extended litigation, the bankruptcy court approved CAL's rejection of the ALPA-CAL collective bargaining agreement, and ordered ALPA and CAL to engage in collective bargaining over the formation of a new labor contract. CAL and ALPA met on and off until late August 1985, when CAL notified ALPA that it was withdrawing recognition of ALPA as the authorized collective bargaining representative of the CAL pilots. ALPA filed suit in the Southern District of Texas in September 1985, challenging CAL's unilateral withdrawal of recognition and its refusal to engage in further negotiations.

As part of its continuing process of filling pilot vacancies, on September 9, 1985, CAL posted "Supplementary-Base Vacancy Bid 1985-5." CAL historically provided for future pilot training and staffing needs through its "System Bid" process. Under CAL's System Bid procedure, any pilot interested in a posted vacancy could submit a bid specifying the pilot's preferred positions based on status (*i.e.*, Captain, First Officer, Second Officer), base (city), and equipment type. Once pilots submitted their bids to CAL, vacant positions were allocated solely according to seniority, determined by the date a pilot first flew for Continental. Promotions to vacancies on new or different equipment from which a pilot had been trained required additional training of pilots before the vacancies were actually filled. CAL's bids were posted well in advance of these vacancies in order to schedule this training while maintaining current service. The 85-5 bid announced vacancies to be filled in 1986 for 441 future Captain and First Officer positions and an undetermined number of Second Officer vacancies. All

participating pilots were requested to submit their bids by September 18, 1985.

Apparently concerned by the number of future vacancies to be awarded under the 85-5 bid, ALPA's Master Executive Council for the CAL pilots (CAL MEC or the MEC),¹ authorized striking pilots to submit bids while also continuing the strike effort. Confusion over the bids tendered by several hundred strikers and questions concerning the legitimacy of their offers to return to work led CAL to challenge the strikers' bids. In late September 1985, the CAL MEC voted to continue the strike.

During October 1985, CAL and a pilots' committee, drawn from ALPA leadership and the CAL MEC, conducted negotiations under the supervision of the bankruptcy court that resulted in an October 31, 1985 consent agreement termed the "Order and Award." This order and award entered by the bankruptcy court established terms for settling both the ALPA strike and the outstanding litigation between the parties. ALPA consented to entry of the order and award without notice to or ratification by the CAL pilots or the CAL MEC.

The October 31, 1985 order and award altered CAL's standard bidding system for the 85-5 bid and the recall of striking pilots. The agreement established three options for strikers. Striking pilots who wished to return to work were required to choose either option 1 or option 3. Option 1 required strikers to waive all claims against CAL (including claims in bankruptcy for unpaid wages, and damages against CAL for abrogation of the collective bargaining agreement). In return CAL agreed to call them back to work according to "modified" seniority provisions. The relevant "transitional" modifications to seniority order and bid procedures included: (1)

¹ The CAL MEC is a committee made up of pilot representatives elected by ALPA rank-and-file. The CAL MEC serves as the ALPA coordinating council for CAL pilots, although its authority is subject to the decisions of the ALPA executive board and board of directors.

current working pilots (nonstrikers) were awarded the first 100 Captain positions in the 85-5 bid. These working pilots were generally ineligible for these positions under an integrated seniority list that included strikers and nonstrikers and standard bidding procedures; (2) the next seventy Captain position were to be awarded to the seventy most senior returning strikers who waived their claims against CAL, all of whom had been Captains before the strike. In filling these seventy vacancies, CAL had the right to assign these returning strikers to the base and equipment of CAL's choice. Additionally, these returning strikers were required to fly as First Officers for four months before assuming the Captain vacancies; (3) thereafter returning strikers would assume Captain positions on a 1:1 ratio with working pilots, essentially "dovetailing" a striker seniority list with a seniority list for replacement pilots.

The working pilots, following usual bid procedures, were awarded particular vacancies under the 85-5 bid on seniority according to their registered preferences for rank, base and equipment; although CAL recalled former strikers by seniority among strikers, CAL assigned each returning striker to CAL's choice of rank, base or equipment regardless of the pilots' preferences. These provisions had the effect of advancing many nonstriking pilots over more senior striking pilots, and awarding to nonstrikers the majority of the 85-5 Captain vacancies, the most desirable positions. Returning strikers, although recalled in seniority order, were required to accept the position offered by CAL, which could be a rank well below what the pilot was entitled to under seniority bidding procedures. Where a former striker upon recall was assigned initially to a First or Second Officer position, CAL had the right to assign the pilot to the base and equipment of his first Captain position as well.²

²To illustrate the effect of these transitional provisions, the O'Neill Group estimated in December 1987 that the most senior

The Agreement provided for filling Captain vacancies on a 1:1 ratio between striker and nonstrikers until at least October 1, 1988. The practical effect of these "transitional" provisions was foreseeably much longer. For example, equipment freezes restricted the ability of pilots to change types of aircraft for varying periods of time after being trained on them (typically two years).

Option 3 permitted pilots to keep their claims against CAL, but provided that they could not return to work nor become Captains until after the Option 1 pilots. Option 3 pilots were to be recalled in the order in which they tendered their unconditional offers to return to work rather than in seniority order. CAL retained the same right to assign the Option 3 pilots to vacancies as described above for Option 1 pilots.

Option 2 covered strikers who elected not to return to work for CAL. CAL agreed to pay these pilots severance pay of \$4,000 for each year of service, up to a total dollar amount of \$2.6 million. In return, the strikers relinquished their right to recall, and released all other claims against CAL.

II.

The O'Neill Group is a certified class comprised of approximately 1,400 past and present CAL pilots who went on strike on October 1, 1983 and remained on strike through October 31, 1985, the date the strike ended. The O'Neill Group brought suit against ALPA, the CAL MEC, and certain individual negotiators in April 1986

returning striker not yet flying as Captain had 23 years of seniority, held seniority number 65 on the integrated seniority list and flew as a Captain before the strike. The most senior working pilot not yet flying as a Captain had four years of seniority at CAL and held seniority number 1442. In addition, the nonstriker bid for his Captain vacancy, whereas the former striker could be assigned his base and equipment by CAL. (Instr. 163, att. 13). Under the 1:1 ratio prescribed by the Order and Award, these were the next two pilots to be promoted to Captain.

for their roles in the strike settlement. In its complaint as amended, the O'Neill Group sought recovery on four counts. Count 1 alleged a breach of the duty of fair representation which ALPA and various ALPA officers owed plaintiffs under the RLA. Count 2 alleged a violation of the voting rights of the plaintiffs, guaranteed under section 101(a)(1) of the LMRDA, 29 U.S.C. § 411. The O'Neill Group also asserted two additional claims not relevant to this appeal.

In August 1987, ALPA moved for judgment on the pleadings and for summary judgment on all counts. The O'Neill Group's response to ALPA's motion for summary judgment was a 150-page memorandum of law and five volumes of affidavits and other exhibits. The O'Neill Group asserted that the duty of fair representation had been breached by ALPA and various ALPA officers because (1) ALPA failed to allow ratification of the agreement and misrepresented the facts surrounding the negotiations to avoid a ratification vote; (2) ALPA negotiated an agreement that arbitrarily discriminated against striking pilots, including the O'Neill Group; (3) ALPA and various ALPA officers misrepresented to retired and resigned pilots that they would be included in any settlement; and (4) defendants were compelled by motives of personal gain, namely self-interest and political motivations. Concerning the LMRDA section 101 claim, the pilots asserted that they were entitled to vote on ratification of the agreement and order, and that liability under LMRDA is assessed against a union that violates the voting rights of all of its members as a matter of law.

Following oral argument in November 1987, the trial court ruled from the bench, granting ALPA's summary judgment motion and dismissing the pilots' suit. The transcript of the court's general bench remarks following argument provides the only explanation for its ruling.

Rather than finding the settlement "beneficial" as ALPA claimed, the trial court remarked: "that the deal is somewhat less than not particularly satisfactory is not relevant to the issue of fair representation," adding that "the agreement that was achieved looks atrocious in retrospect, but it is not a breach of fiduciary duty badly to settle the strike." The court apparently concluded that the pilots had no legal rights against ALPA because the settlement was issued as a court order, and alternatively because the agreement did not single out particular members for discriminatory treatment. "There is nothing to indicate that the union made any choices among the union members or the strikers who were not union members other than on the best deal the union thought it could construct." With respect to the pilots' claim that ALPA denied their voting rights, the district court concluded that: "in Count 2, the equality within the craft under the cases apparently precludes that claim."

The O'Neill Group appeals the dismissal of Count 1 (duty of fair representation) and Count 2 (LMRDA section 101 ratification rights) of their complaint.

III.

Our task in this case is to review the district court's determinations that no genuine issue of material fact is presented and summary judgment is proper as a matter of law. This undertaking in a complex case with a summary judgment record in excess of 6,000 pages is particularly difficult because the district court's cursory bench remarks provide little help to us in analyzing the issues. As this court reiterated recently, "Although nothing in Fed.R.Civ.P. 56, governing summary judgment, technically requires a statement of reasons by a trial judge for granting a motion for summary judgment, we have many times emphasized the importance of a detailed discussion by the trial judge." *McIncrow v. Harris County*, 878 F.2d 835, 835 (5th Cir. 1989), quoting, *Heller v. Namer*, 666 F.2d 905, 911 (5th Cir. 1982)

(footnote omitted). "In all but the simplest case, such a statement usually proves not only helpful, but essential." *Jot-Em-Down Store (JEDS) Inc. v. Cotter & Co.*, 651 F.2d 245, 247 (5th Cir. 1981). "When given such aid, counsel know what issues must be met and the appellate court need not scour the entire record while it ponders the possible explanations." *Id.*

To survive summary judgment, the O'Neill pilots are required to present summary judgment evidence tending to show a genuine issue of material fact. In several recent decisions, the Supreme Court has clarified what is required of the plaintiffs by this standard. "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). "Rule 56(e) therefore requires the non-moving party to go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' to designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324, 106 S.Ct. at 2553. Plaintiffs' evidence is to be believed, however, and all justifiable inferences are to be drawn in their favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). In reviewing the district court's ruling on a motion for summary judgment, we apply the same standard that governs the district court. *Bache v. American Tel. & Tel.*, 840 F.2d 283 (5th Cir.), cert. denied, — U.S. —, 109 S.Ct. 219, 102 L.Ed.2d 210 (1988).

A. Fair Representation Claims

The duty of fair representation owed by a union to its members has been implied by the courts from national

labor statutes. The Supreme Court has stated that the duty of fair representation imposes on the exclusive bargaining representative "a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 842 (1967). More succinctly, "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190, 87 S.Ct. at 916.

ALPA would have us adopt a standard which requires intentional or deliberate misconduct by the union in order to find a breach of the duty of fair representation. We consistently have held, however, that the Supreme Court's definition of the duty of fair representation enunciated in *Vaca v. Sipes* "recognizes three distinct standards of conduct." *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 n. 6 (5th Cir.1976). See *Hammons v. Adams*, 783 F.2d 597, 601 (5th Cir.1986) ("[The union's] conduct, however, must not be 'arbitrary, discriminatory, or in bad faith;' a standard that has since been repeated by the Court with only minor rephrasing.") (citations omitted); *Christopher v. Safeway Stores, Inc.*, 644 F.2d 467 (5th Cir.1981); *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332 (5th Cir.1980); *Sanderson v. Ford Motor Co.*, 483 F.2d 102, 110 (5th Cir.1973). See also *Griffin v. Int'l Union, United Automobile A & AIW*, 469 F.2d 181, 183 (4th Cir.1972) ("A union must conform its behavior to each of these three separate standards. . . . Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.").

A breach of the duty of fair representation does not require that a union's conduct be taken in bad faith or with hostile discrimination, but may rest upon the arbi-

trariness or irrationality of the union's acts. See *Bache v. AT & T*, 840 F.2d at 291. Addressing "the arbitrariness standard" this circuit has stated in *Tedford*:

We think a decision to be non-arbitrary must be (1) based upon relevant, permissible union factors which excludes the possibility of it being based upon motivations such as personal animosity or political favoritism; (2) a rational result of the consideration of these factors; and (3) inclusive of a fair and impartial consideration of the interests of all employees.

Tedford, 533 F.2d at 957 (footnotes omitted) (emphasis added).

A breach of the duty of fair representation requires more than a showing of negligence or "honest, mistaken conduct." *Amalgamated Ass'n of Street, etc. v. Lockridge*, 403 U.S. 274, 301, 91 S.Ct. 1909, 1925, 29 L.Ed.2d 473 (1971). *Accord Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71, 96 S.Ct. 1048, 1059-60, 47 L.Ed.2d 231 (1976); *Coe v. United Rubber Workers*, 571 F.2d 1349, 1350 (5th Cir.1978) (per curiam) ("carelessness or inadvertence neither constitutes nor is evidence of" a breach of fair representation duty). Particularly in the bargaining context, a union's responsibilities permit the exercise of judgment within a wide range of reasonableness, "subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Hammons v. Adams*, 783 F.2d at 601, quoting, *Hines* 424 U.S. at 564, 96 S.Ct. at 1056. In order to prove a breach of the union's duty to the membership, it is insufficient to show merely "that the union improperly balanced the rights and obligations of the various groups it represents." *Freeman v. Grand Int'l Bro. of Locomotive Engineers*, 375 F.Supp. 81, 93 (S. D. Ga.), *aff'd*, 493 F.2d 628 (5th Cir.1974).

ALPA argues that the bankruptcy court's approval of the order and award gives rise to a presumption that the

settlement is fair, adequate and reasonable. We disagree; all the terms of the settlement the pilots complain of in this litigation had been resolved by ALPA and CAL before the proposed order was submitted to the bankruptcy court. The order and award therefore constituted in essence a consent decree, embodying "primarily the results of negotiation rather than adjudication." *United States v. City of Miami*, 664 F.2d 435, 440 (5th Cir. 1981). We agree with the pilots that the bankruptcy court's approval of the settlement does not insulate ALPA's conduct from scrutiny, nor bar the pilots' claims. See *Ibarra v. Texas Employment Com'n.*, 823 F.2d 873 (5th Cir.1987).

We now turn to the pilots' specific arguments of how ALPA breached the duty of fair representation. The pilots' most fundamental complaint is that ALPA's strike settlement was irrational and arbitrary because of the gross disadvantages the pilots suffered under the settlement that they would not have suffered if they had simply surrendered to CAL's demands and returned to work. We are persuaded that a jury would be entitled to infer that ALPA was arbitrary in accepting the strike settlement if it finds that the union should have expected much more favorable treatment for the pilots had the pilots simply given up the strike effort and offered to return to work. In other words, a jury might reasonably find the union's conduct irrational or arbitrary if the union inexplicably agreed to a settlement that left its members in a substantially worse position than if no settlement had been made. We conclude that a jury could find that the order and award left the striking pilots worse off in a number of respects than complete surrender to CAL.

ALPA contends that the strike settlement provided for CAL to reemploy strikers who would not have otherwise been entitled to return to work at CAL. We disagree. The striking CAL pilots who had not obtained substantially similar jobs (as pilots) continued to be employees

of CAL. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, 88 S.Ct. 543, 545, 19 L.Ed.2d 614 (1967). Because this strike was an economic one, CAL was entitled to hire permanent replacement workers to continue business operations. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46, 58 S.Ct. 904, 910-11, 82 L.Ed.2d 1381 (1938). Had the strike terminated without the settlement, CAL was not required to discharge these replacement workers in order to rehire the former strikers. But absent exceptional circumstances discussed below, the returning strikers, as CAL employees, were entitled to reinstatement as vacancies occurred. *Id.*

ALPA asserts several possible justifications which CAL potentially could have offered to avoid rehiring the returning strikers. These justifications include "legitimate and substantial business reasons," and striker "misconduct." See *OCAW v. American Petrofina Co.*, 820 F.2d 747, 750 (5th Cir.1987). But the summary judgment evidence provides no clear basis for this concern. Furthermore ALPA's outside legal counsel advised the ALPA leadership in September 1985 that CAL had not practiced dilatory tactics in reinstating individual strikers who offered to return to work, and consequently he felt such tactics were unlikely should ALPA submit an offer to return on behalf of all strikers. Thus a factfinder could infer that ALPA knew that CAL would not have refused to rehire strikers if ALPA had tendered an unconditional offer for the pilots to return to work.

The most fundamental rights the strikers lost in the order and award were their rights that flowed from seniority. ALPA argues that the pilots had absolutely no assurance that CAL would have recognized any of their seniority rights if they had unconditionally offered to return to work. Thus, ALPA contends that the limited seniority secured by the settlement was beneficial to the pilots. The pilots submitted strong summary judgment evidence however that CAL intended to reinstate strikers with ordinary seniority rights and privileges after the

strike ended.³ ALPA was advised by its legal counsel in September 1985 that CAL would be obligated to recall strikers in seniority order if they were still employees of the company. Accepting the pilots' evidence as true as we are required to do, a jury could reasonably conclude that if ALPA had unconditionally offered to return the pilots to duty, CAL likely would have returned striking pilots to work according to seniority, and would have permitted strikers to bid for vacancies according to CAL's seniority-based assignment procedures.

Furthermore, if the pilots had unconditionally agreed to return to work, CAL could not have changed its policy of assigning work by seniority, thereby adversely affecting returning strikers, unless it had a legitimate and substantial business justification for doing so. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34, 87 S.Ct. 1792, 1798, 18 L.Ed.2d 1027 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 231, 83 S.Ct. 1139, 1147, 10 L.Ed.2d 308 (1963); *George Banta Co. v. NLRB*, 686 F.2d 10, 19 (D.C.Cir.1982); *Lone Star Industries, Inc.*, 279 N.L.R.B. 550, 122 L.R.R.M. 1162 (1986). Yet the

³ For example, CAL's standard bidding procedures, awarding vacancies to the bidders with highest seniority, were in effect before and during the strike, and were not altered for replacement pilots or for individual strikers who had chosen to return to work. (Instr. 163, atts. 8,9; Instr. 149, exh. 101). CAL stated in a claim filed September 25, 1985 in the Southern District of Texas (hoping to void all 85-5 bids from strikers) that it honored pre-strike seniority of all pilots returning from the strike; that all striking pilots continued to accrue seniority during the strike; and that many strikers were eligible to win their bids for Captain positions under the 85-5 bid because of their seniority levels (Instr. 163, att. 9, ¶¶ 10, 32). The record further includes evidence that ALPA discussed the subject with CAL during the September 1985 MEC meetings, and CAL indicated that it would honor an unconditional return and recall strikers in seniority order according to their bids. (Instr. 163, att. 5.5 at 166-69). CAL had returned striking flight attendants and machinists to work in seniority order, with all the benefits and privileges of seniority, after both unions tendered unconditional offers to return to work in April 1985. (Instr. 163 att. 6).

order and award allowed CAL to disregard the seniority of returning strikers in awarding jobs and to assign less senior nonstriking pilots to vacant positions. If a jury accepts the pilots' evidence that CAL likely would have recognized the returning strikers' seniority rights and privileges if they had unconditionally agreed to return to work it could further infer that ALPA was arbitrary in accepting the unfavorable settlement.

We reject ALPA's argument that the 85-5 bid positions were not vacancies at the time the order and award issued because they had been assigned to working pilots by that date. In August 1985, ALPA prevailed on this issue in another suit: a federal district court held that bid positions were not filled until pilots were trained and serving in these positions. *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D.Ill. 1985), *aff'd in relevant part*, 802 F.2d 886 (7th Cir.1986), *cert. denied*, 480 U.S. 946, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987). *See also Indep. Federation of Flight Attendants v. Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir.1987). ALPA, in the face of this favorable ruling in an analogous case involving striking United Airlines pilots, approved the terms of the order and award, generally permitting replacement pilots to keep the 85-5 bid vacancies awarded them, except in isolated instances where the transition provisions of the settlement otherwise provided.

In sum, the returning strikers were generally senior to the working pilots and under ordinary seniority rules entitled to fill the vacancies announced in the 85-5 bid. Yet the terms of the order and award gave the nonstriking, working pilots most of these positions. Also returning strikers who wanted to return to work were required to waive any claims for damages they had against CAL. A factfinder could infer that had ALPA unconditionally offered to return the pilots to work, the strikers would have been recalled in seniority order, and would have been able to successfully bid for these vacancies and also preserve their litigation rights against CAL.

The pilots also contend that ALPA breached its duty of fair representation by negotiating a settlement which impermissibly discriminated against strikers. The pilots argue that the order and award impermissibly preserved strikers and nonstrikers as two distinct groups after recall so CAL could reward the nonstrikers and punish the strikers. ALPA argues it must be given broad negotiating discretion and that agreeing to an arrangement which divides CAL pilots into strikers and nonstrikers for a transitional period is not per se illegal or a breach of its duty to the pilots. The Supreme Court has stated that a wide range of reasonableness must be allowed a bargaining representative in serving the unit it represents, but a union's broad authority in negotiating and administering effective agreements is not without limits. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554.

The Supreme Court has expressed special concern for post-strike working conditions which "create[] a cleavage . . . continuing long after the strike is ended. Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach . . . stands as an ever present reminder of the dangers connected with striking and with union activities in general." *NLRB v. Erie Resistor Corp.*, 373 U.S. at 230. "These are the types of employer action that have been held inherently destructive of employee rights." *NLRB v. American Olean Tile, Co.*, 826 F.2d 1496, 1500 (6th Cir.1987). The pilots have raised a genuine issue of material fact as to whether the adverse, discriminatory post-strike treatment of strikers under the strike settlement can be justified. Depending upon the explanation offered by ALPA, a factfinder might infer that the negotiated division of pilots into strikers and nonstrikers and the subsequent unfavorable discriminatory treatment of returning strikers constituted a breach of the union's duty of fair representation.

B. Ratification Rights.

The O'Neill Group asserts in its second count that the union violated section 101(a)(1) of LMRDA by denying the right of rank-and-file members to ratify the settlement agreement.

Section 101(a)(1) of LMRDA states:

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

29 U.S.C. § 411(a)(1). Section 101(a)(1) does not grant voting rights where none are conferred by a union's constitution or bylaws; rather it serves to protect the fair exercise of any rights that are provided by the union's constitution and bylaws.

The law does not require that a collective bargaining agreement be submitted to a local union or the union membership for authorization, negotiation or ratification, in the absence of an express requirement in the agreement, or in the constitution, by-laws or rules and regulations of the union. The statute [LMRDA § 101(a)(1)] does not require submission of proposed agreements or any segments thereof to the membership; nor grant members of the right to vote on negotiating, executing and approving contracts.

Confederated Independent Unions v. Rockwell-Standard Co., 465 F.2d 1137, 1140 (3d Cir.1972) (citations omitted). Thus, our first inquiry is to examine whether voting rights were conferred upon the rank-and-file by the ALPA constitution or bylaws.

The ALPA constitution as amended in 1982 provided in relevant part:

Sec. 2. The conclusion of an agreement shall, at the direction of the individual Master Executive Council, be subject to ratification.

Both parties agree that the above constitutional provision required ratification by the membership if, but only if, the MEC subjected an agreement to ratification. Thus we must decide whether the CAL MEC had determined that the proposed settlement of the CAL pilots strike required ratification before the order and award was submitted to the bankruptcy court.

The pilots contend that CAL MEC passed a resolution in September 1983 requiring pilot ratification of any agreement giving concessions to CAL. They rely upon this resolution for the right of the membership to ratify the strike settlement of October 31, 1985. The relevant portion of this states: "BE IT FURTHER RESOLVED that the final pilot cost reduction plan will be subject to membership ratification prior to final approval and implementation."

This resolution was passed by the CAL MEC during a meeting in which the MEC was debating whether to participate in a \$150 million cost reduction plan for all CAL employees. CAL had been in financial trouble for some time, and in September 1983 had submitted specific cost reduction proposals to its employee groups. A \$60 million package of pay, benefits and productivity concessions was submitted to the CAL pilots, embodied in a document known as the "New Continental Pilot Employment Policy." In its September 19 resolution, the CAL MEC agreed in principle to participate in the \$60 million cost reduction plan, but sought to negotiate over its specific terms. The MEC further resolved that the final cost reduction plan would be subject to membership ratification. CAL and ALPA did not agree on a final plan,

and on September 24, 1983, CAL filed a bankruptcy petition.

The language of this resolution is unambiguous. It does not grant a blanket right to the membership to ratify all future strike settlements; it plainly accords to the membership the right to ratify the "final cost reduction plan" under discussion at that time. This resolution by its plain language does not support the pilots' asserted right to ratify the strike settlement agreement reached more than two years later.

The pilots further contend that MEC officials orally assured the pilots throughout the strike that the rank-and-file would be able to vote on any strike settlement.⁴ A factfinder might infer a breach of ALPA's duty of fair representation if it finds the union misrepresented the right of the membership to ratify any settlement agreement. *Cf. Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1397 (9th Cir.), cert. denied, 479 U.S. 816, 107 S.Ct. 73, 93 L.Ed.2d 29 (1986) ("a duty of fair representation cause of action can be maintained when union representatives make misrepresentations to the union membership during the ratification process"); *Christopher v. Safeway Stores, Inc.*, 644 F.2d 467, 472 (5th Cir.1981). But misrepresentations by individual MEC members or union officials to pilots do not provide the necessary express grant of a ratifica-

⁴ The pilots also argue that section 101 was violated because the union failed to obtain MEC approval for the settlement as required in the MEC policy manual. But section 101 only secures certain rights of the rank-and-file members to vote and to participate in their union affairs. Thus, accepting for these purposes the pilots' interpretation of the union policy, the union's violation of the policy by refusing to allow MEC to approve the settlement is not actionable under section 101 because it is not a right granted to the rank-and-file membership. The pilots have the opportunity on remand to persuade the district court that if the policy requiring MEC approval was violated, this is a predicate for recovery on their unfair representation claim.

tion right to the rank-and-file members that is required to support an action under section 101(a)(1).

Ordinarily a ratification right accorded a union's membership is contained in the union's constitution or bylaws. Here the constitution delegated authority to the MEC to decide which agreements the members were entitled to ratify. According to the CAL MEC's policy manual, MEC policy is to be established, amended or rescinded by a majority vote of the MEC. Certainly assurances by individual MEC members to rank-and-file members of a ratification right are not decisions of the MEC body. Where the voting right is not contained in the constitution and bylaws any provision for membership ratification must be clear and unambiguous; to trigger section 101 protection the voting right must be expressly granted according to established policymaking procedures. To imply a voting right where none is clearly provided would impermissibly interfere with the union's organizational structure. *See Calhoon v. Harvey*, 379 U.S. 134, 140, 85 S.Ct.292, 296 13 L.Ed.2d 190 (1964). In sum, we agree with the district court that the union members had no right to approve the settlement embodied in the order and award. Summary judgment was proper as to this claim.

C. Conclusion

Based on our review of the summary judgment record, we find at least two critical issues of material fact that preclude summary judgment on the union's duty of fair representation claim. First, a factfinder may infer that the settlement agreement negotiated by ALPA was so less favorable to the striking pilots than the likely consequences of a total surrender of the strike effort as to be arbitrary and a breach of the union's duty to fairly represent its members. A jury would also be entitled to find that the agreed-to settlement provisions breached the union's duty of fair representation because it impermis-

sibly and unjustifiably divided the CAL pilots after recall into two camps of former strikers and nonstrikers and permitted CAL to discriminate against strikers. It is unnecessary for us to decide whether additional issues of fact are presented on this claim. We agree with the district court's dismissal of the pilots' section 101 voting rights claim.

The judgment of the district court is therefore VACATED and the case REMANDED for further proceedings consistent with this opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2848

JOSEPH E. O'NEILL, *et al.*,
Plaintiffs-Appellants,

versus

AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas

**ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING *EN BANC***

(Opinion October 31, 5 Cir., 1989, — F.2d —)

(December 27, 1989)

Before POLITZ, DAVIS and DUHE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

() The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the

members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge